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ocketed:
une 14, 1985

Title: Richard E. Lyng, Secretary of Agriculture, et al., Petitioners
v.
Ronald E. Payne, etc.

Court: United States Court of Appeals for the Eleventh Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Tripp Jr., Theodore L.

| ntry | Date | Note | Proceedings and Orders |
|---|---|---|---|
| 1 | Jun 14 1985 | G | Petition for writ of certiorari filed. |
| 3 | Jul 12 1985 | | Order extending time to file response to petition until August 12, 1985. |
| 4 | Aug 12 1985 | | Brief of respondents Ronald E. Payne, et al. in opposition filed. |
| 5 | Aug 14 1985 | | DISTRIBUTED. September 30, 1985 |
| 6 | Sep 4 1985 | X | Reply brief of petitioners Block, Sec. of Agriculture, et al. filed. |
| 7 | Oct 7 1985 | | Petition GRANTED. |
| 8 | Oct 17 1985 | G | Motion of the Solicitor General to dispense with printing the joint appendix filed. |
| 9 | Nov 4 1985 | | Motion of the Solicitor General to dispense with printing the joint appendix GRANTED. |
| 11 | Nov 14 1985 | | Order extending time to file brief of petitioner on the merits until December 12, 1985. |
| 12 | Dec 12 1985 | | Brief of petitioners Block, Sec. of Ag., et al. filed. |
| 15 | Jan 3 1986 | | Order extending time to file brief of respondent on the merits until January 31, 1986. |
| 16 | Jan 10 1986 | | Record filed. |
| 17 | Jan 10 1986 | | Certified copy of original record, supplemental record and proceedings received. (Box). |
| 18 | Jan 23 1986 | | Order further extending time to file brief of respondent on the merits until February 7, 1986. |
| 19 | Feb 4 1986 | | SET FOR ARGUMENT, Monday, March 24, 1986. (3rd case) |
| 20 | Feb 7 1986 | | Brief of respondents Ronald E. Payne, et al. filed. |
| 21 | Feb 11 1986 | | CIRCULATED. |
| 22 | Mar 17 1986 | X | Reply brief of petitioners Block, Sec. of Ag., et al. filed. |
| 23 | Mar 24 1986 | | ARGUED. |

# PETITION FOR WRIT OF CERTIORARI

84-1948

No.



# In the Supreme Court of the United States

OCTOBER TERM, 1984

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JOHN R. BLOCK, SECRETARY OF AGRICULTURE, ET AL., PETITIONERS

*v.*

RONALD E. PAYNE, ET AL.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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## QUESTION PRESENTED

Whether the Secretary of Agriculture may be equitably estopped from enforcing a valid regulation establishing a deadline for filing of applications for Farmers Home Administration emergency loans on the ground that the agency's news release announcing the availability of loans did not specify the generous terms of the loan program.

## PARTIES TO THE PROCEEDING

In addition to the Secretary of Agriculture, the Administrator of the Farmers Home Administration, the State Director and Assistant State Director of the agency's Florida office, the FmHA County Supervisor for Madison County, Florida, and a District Supervisor of the FmHA were defendants below and are petitioners in this Court.* In addition to Ronald E. Payne, Carbie Ellie was an individual plaintiff below and is a respondent in this Court. Payne and Ellie were certified as representatives of a class of farmers in a 13-county area of north Florida covered by presidential disaster declaration M-345 who suffered losses from floods or storms in early April 1973 and who were eligible to apply for emergency loans administered by the FmHA but were not so notified by the agency (App., *infra*, 46a-47a).

In the district court, James H. Collins attempted to intervene as a plaintiff representing a class of farmers in 27 states and Puerto Rico who had suffered losses as a result of natural disasters occurring between December 27, 1972, and April 19, 1973, and who had been eligible to apply for emergency loans. Collins appealed unsuccessfully from the denial of his motion to intervene (App., *infra*, 27a-29a).

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*The complaint named various incumbent and past occupants of these offices as defendants in their individual capacities and sought damages from these defendants. The district court dismissed the claim for damages and no appeal was taken from that ruling. See App., *infra*, 6a n.7. Thus this action survives only as one against the various federal officials in their official capacities.

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# In the Supreme Court of the United States

OCTOBER TERM, 1984

No.

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, ET AL., PETITIONERS

*v.*

RONALD E. PAYNE, ET AL.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Agriculture, the Administrator of the Farmers Home Administration (FmHA), and FmHA officials in Florida, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

### OPINIONS BELOW

The opinion of the court of appeals on remand from this Court (App., *infra*, 1a-3a) is reported at 751 F.2d 1191. The initial opinion of the court of appeals (App., *infra*, 4a-29a) is reported at 714 F.2d 1510. The supplemental opinion of the court of appeals on petition for rehearing (App., *infra*, 30a-33a) is reported at 721 F.2d 741. The opinion of the district court (App., *infra*, 34a-45a) is unreported.

### JURISDICTION

The judgment of the court of appeals on remand from this Court was entered on January 31, 1985. A timely

petition for rehearing was denied on March 19, 1985 (App., *infra*, 65a-66a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTES AND REGULATIONS INVOLVED

Sections 4 and 10(c) of Pub. L. No. 93-237, 87 Stat. 1024-1025, Sections 1, 3, 4 and 8 of Pub. L. No. 93-24, 87 Stat. 24-25, and Section 5 of Pub. L. No. 92-385, 86 Stat. 557 are set forth at App., *infra*, 59a-64a. The applicable regulations, 7 C.F.R. 1832.81-1832.83 (1975), are set forth in pertinent part at App., *infra*, 53a-55a.

## STATEMENT

Like its earlier decision that was vacated by this Court and remanded for further consideration in light of *Heckler* v. *Community Health Services*, No. 83-56 (May 21, 1984), the decision of the court of appeals on remand requires the Secretary of Agriculture to reopen an emergency farm loan program that expired more than 10 years ago.

1. a. For many years the Farmers Home Administration of the Department of Agriculture has administered a program of emergency loans designed to make possible continuation of farming operations by farmers who have suffered crop losses or property damage as a result of natural disasters such as floods, storms, or drought. See Consolidated Farm and Rural Development Act §§ 321-330, 7 U.S.C. 1961-1971. From time to time Congress has adjusted the interest rates, credit conditions and forgiveness of indebtedness provisions of the emergency loan program. Generally, however, if crop yields are substantially and adversely affected by a formally declared natural disaster and losses are not covered by insurance, an affected farmer may apply for an emergency loan. See generally 7 U.S.C. 1961; 7 C.F.R. Pt. 1945; 7 C.F.R. Pt. 1832 (1974).

b. In early April 1973, heavy rains caused flooding, crop losses and property damage in a 13-county area of



northern Florida. On May 26, 1973, the President declared this region to be a major disaster area. Pursuant to Section 321 of the Consolidated Farm and Rural Development Act, 7 U.S.C. 1961, the Secretary was then authorized to make emergency loans to farmers suffering losses in the affected area. Under the terms of the emergency loan program in effect at the time of the disaster designation, emergency loans bore an interest rate of 5%, and applicants were required to show inability to obtain credit from ordinary commercial sources. See Pub. L. No. 93-24, §§ 3, 4, 87 Stat. 24-25. No provision was made for cancellation of any portion of the principal amount of the loan.[1] FmHA required applications for loans to cover crop losses to be filed within nine months of the formal disaster declaration. Thus, in the case of the north Florida floods of April 1973, applications were due no later than February 26, 1974. App., *infra*, 4a-6a. Apparently no loans were made in

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[1] By contrast, a different set of loan terms, much more generous to the borrower, had been in effect in 1972, pursuant to Section 5 of Pub. L. No. 92-385, 86 Stat. 557. Under the 1972 statute, emergency loans carried a 1% interest rate; eligibility was not conditioned upon unavailability of alternative sources of credit; and borrowers could have 50% of the loan principal, up to $5,000, cancelled at will.

Because the 1972 loan program triggered an unprecedented volume of loan applications, resulting in a severe drain on loan funds available to FmHA, the Secretary halted the making of emergency loans on December 27, 1972. In response, on April 20, 1973, Congress enacted Pub. L. No. 93-24, 87 Stat. 24 *et seq.* Section 1 of that Act repealed Section 5 of Pub. L. No. 92-385. Section 4 of Pub. L. No. 93-24 set a rate of 5% for new emergency loans. Section 3 imposed the requirement that credit be unavailable from alternative sources. A grandfather clause (§ 8, 87 Stat. 25) provided that loans to cover losses arising out of disasters declared prior to December 27, 1972, could still be sought under the 1972 loan program, if application was made with 18 days of the date of enactment—*i.e.*, by May 8, 1973. App., *infra*, 10a-12a, 17a n.24.

the north Florida disaster area during this period (*id.* at 9a).

On January 2, 1974, however, Congress liberalized the terms and conditions for FmHA emergency loans with respect to natural disasters occurring between December 27, 1972, and April 20, 1973. The new law made available emergency loans bearing a 1% interest rate for eligible farmers who had suffered losses in this interval, authorized cancellation of 50% of the principal amount of indebtedness, up to $5,000, and dispensed with the requirement that applicants show the unavailability of credit from other sources. Pub. L. No. 93-237, § 4, 87 Stat. 1024.[2] Congress directed that the Secretary of Agriculture "extend for ninety days after the date of [the new] enactment" the otherwise applicable deadline for seeking emergency loan assistance, if the administrative deadline based on the date of the disaster declaration was earlier. Pub. L. No. 93-237, § 10(c), 87 Stat. 1025; see H.R. Rep. 93-363, 93d Cong., 1st Sess. 2 (1973). The effect of this provision was to enlarge the deadline for north Florida farmers to apply for emergency loans from February 26, 1974, through April 2, 1974, and to make available more favorable loan terms than previously had been offered.

On February 15, 1974, FmHA issued instructions to its staff and rules to implement the special emergency loan program created by Pub. L. No. 93-237. Initially issued as staff Special Instruction 441.5 in unpublished form, the directive was published without material change in the Federal Register on February 27, 1974. 7

[2] Technically, Section 4 provided that notwithstanding the provisions of Pub. L. No. 93-24, which had phased out the more generous loan program that had been in effect in 1972 under Pub. L. No. 92-385, the 1972 loan program terms would remain available to farmers who had suffered losses in natural disasters occurring between December 27, 1972, and April 20, 1973 (the date of enactment of Pub. L. No. 93-24). See page 3 note 1, *supra*.



C.F.R. Pt. 1832, Subpt. E, at 39 Fed. Reg. 7569.[3] The Federal Register publication included all pertinent details concerning the terms and conditions of the special emergency loan program, including the 1% interest rate, the forgiveness provision, and the absence of any requirement that unavailability of other credit be demonstrated. 7 C.F.R. 1832.82(a) and 1832.83(a), at 39 Fed. Reg. 7570-7571 (App. *infra*, 54a-55a). The regulations also specified that "the termination date for acceptance of applications * * * will be April 2, 1974" (*id.* at 54a).

In addition, although Pub. L. No. 93-237 did not require that the special loan program be publicized in any special manner, the agency's staff instructions stated:

> State Directors and County Supervisors will inform the news media, including newspapers, radio and television in the affected counties of the provisions of P.L. 93-237. A suggested news release for local use is attached as Exhibit C.

App., *infra*, 49a, 54a.[4] The "suggested news release" was transmitted by the state FmHA director to local agency offices on February 28, 1974, and was in turn "forwarded to the local media" (*id.* at 10a).[5] The press release, which was carried in at least two newspapers in the north Florida disaster area (see DX's 11A and

[3] Pertinent portions of Special Instruction 441.5 as originally issued are reproduced at App., *infra*, 48a-49a. Pertinent portions of the provisions published in the Federal Register are reproduced at App., *infra*, 52a-55a.

[4] The reference to the suggested news release was not included in the Federal Register version of the publicity directive. The suggested news release itself is reproduced at App., *infra*, 50a-51a. See also *Emergency Disaster Loan Ass'n, Inc.* v. *Block*, 653 F.2d 1267, 1272 (9th Cir. 1981) (Boochever, J., concurring, quoting Special Instruction 441.5).

[5] The press release actually employed in Florida is reproduced at App., *infra*, 57a-58a. It is identical to the release attached to Special Instruction 441.5.

11B, C.A. App. 48a, 49a), advised farmers that they could apply for emergency loans from FmHA under Pub. L. No. 93-237 if they had suffered property or crop losses as a result of the April 1973 flooding, and that the application period would close on April 2, 1974. Only a handful of loan applications were received in this period (App., *infra*, 24a-25a).

2. Respondent Payne, a north Florida farmer, filed this action in the United States District Court for the Middle District of Florida on August 19, 1976. Although respondent Payne had received actual notice of the special 1974 emergency loan program, had applied for a loan, and had received one, he brought suit on behalf of a class of roughly 2500 farmers in the 13-county area covered by the May 26, 1973 disaster declaration who allegedly had been eligible for loans under the 1974 program. Contending that the class members had been denied property without due process by inadequacies in the publicity given to the special loan program, and that the FmHA had violated its own regulations governing publicity, respondent sought entry of an injunction directing that the 1974 loan program be reopened. C.A. App. 56a-61a.[6]

The district court certified a class consisting of all farmers in the 13-county area covered by the May 26, 1973 disaster declaration who suffered damages as a result of the natural disaster, were eligible to apply for emergency loans, and were not so notified (App., *infra*, 44a). In an opinion issued on February 11, 1981, the court held that the publicity given to the emergency

[6] Respondent also sought damages for himself against the named defendants in their individual capacities (C.A. App. 61a-67a). The district court dismissed the damages claim. Respondent appealed, but his appeal was dismissed because no order had been entered under Fed. R. Civ. P. 54(b). Respondent did not cross-appeal when a final judgment was ultimately entered. The court of appeals accordingly did not pass on the damages claim. App., *infra*, 6a n.7.



loan program in 1973-1974 by the responsible FmHA offices did not satisfy the requirements of general agency publicity regulations, including a directive to make "such public announcements as appear appropriate" (7 C.F.R. 1832.3(a)(1) (1973)). App., *infra*, 42a-43a. Accordingly, the court enjoined FmHA to reopen the 1974 emergency loan program in the 1973 north Florida disaster area, directed the agency to give notice of the reopened program, and required it to process applications under the eligibility requirements prevailing in 1974 and to make loans upon the terms that were applicable in 1974 (*id.* at 43a-45a).[7]

3. a. On appeal, the government argued that by mandating reopening of the long closed 1974 emergency loan program, in disregard for the applicable deadline established by law, the district court had impermissibly estopped the United States from enforcing lawful conditions upon the receipt of public benefits, contrary to *Schweiker* v. *Hansen*, 450 U.S. 785 (1981), and *FCIC* v. *Merrill*, 332 U.S. 380 (1947). The government also argued that the publicity given to the 1973 and 1974 emergency loan programs in north Florida met any judicially enforceable legal requirements.[8]

[7] The court of appeals stayed the judgment of the district court pending appeal (App., *infra*, 13a).

[8] In addition, the government argued that respondent Payne, who had actual notice of the special 1974 loan program and had in fact applied for and received a loan, lacked standing to complain that the program publicity was inadequate and was not a proper representative of a class seeking reopening of the loan program. The court of appeals granted a limited remand requested by respondent in this connection. See App., *infra*, 13a n.19. On June 7, 1982, the district court entered an amended final judgment naming Carbie Ellie, a member of the class previously certified, as an additional representative plaintiff (*id.* at 46a-47a). The court of appeals concluded that these developments rendered the standing issue moot (*id.* at 13a n.19).

b. The court of appeals affirmed (App., *infra*, 4a-29a). The court held that the publicity given to the special 1974 emergency loan program created by Pub. L. No. 93-237 in the north Florida disaster area was inadequate. The court reasoned that the press release disseminated by the state and local FmHA offices "failed to 'inform the news media ... of the *provisions* of P.L. 93-237'" (App., *infra*, 25a (quoting 39 Fed. Reg. 7570 (1974); emphasis added by the court of appeals)) because it did not mention the reduced interest rate, the possibility of partial cancellation of the debt, or the waiver of any requirement that the unavailability of alternative sources of credit be demonstrated. The court thus concluded that the agency had failed to comply with its own publicity regulations governing the special 1974 emergency loan program (App., *infra*, 25a, 27a n.35).[9]

The court of appeals rejected the government's contention that the district court lacked authority to require reopening of the 1974 loan program (App., *infra*, 14a-22a). Initially, the court of appeals held that Section 10(c) of Pub. L. No. 93-237 (see page 4, *supra*) did not establish a *statutory* deadline for the filing of applications under the special 1974 emergency loan program. The court of appeals held that the statute merely mandated a minimum extension of administratively set deadlines, to ensure that those deadlines did not expire before eligible farmers had an opportunity to apply for assistance. The court concluded that the Secretary had authority to prescribe filing deadlines and, in the circumstances presented, could extend, or could be ordered (under the Administrative Procedure Act) to extend, the deadline for the 1974 loan program beyond April 2, 1974. App., *infra*, 16a-19a.

[9] Because of this holding, the court of appeals did not reach the question whether, as the district court had held, the publicity provided failed to satisfy other requirements of FmHA regulations, such as the requirement for "such public announcements as appear appropriate" (see pages 6-7, *supra*). The court also declined to decide whether the latter requirement was simply too amorphous to be judicially enforceable. App., *infra*, 25a.



The court of appeals stated that it did not "condone the failure of potential loan applicants to follow legitimate time restrictions set as prerequisite to applying for government benefits" (App., *infra*, 18a). In the court's view, however, FmHA's failure to give the special 1974 emergency loan program fuller publicity created "exigent circumstances beyond the farmers' control [that] precluded intended beneficiaries from applying for loans," and justified the district court's order that the agency "extend the loan period" (*id.* at 18a, 19a). Citing *Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954), and *Morton* v. *Ruiz*, 415 U.S. 199 (1974), the court of appeals stated that reopening of the 1974 loan program was simply an application of the principle that agencies must abide by their own regulations (App., *infra*, at 19a, 21a-22a).

The court of appeals rejected the contention that *Schweiker* v. *Hansen*, *supra*, was controlling here (App., *infra*, 19a-21a). The court's primary ground for distinguishing *Hansen* was that reopening the emergency loan program would "not threaten the public fisc" because "[l]oans * * * presumably are repaid" (App., *infra*, 21a). The court also reasoned that this case involved "failure on the part of an entire agency to follow self-imposed regulations" (*id.* at 20a), rather than a negligent act of an individual government employee (*id.* at 19a-20a). Finally, the court of appeals remarked that "the error in *Hansen* was revocable," but that the agency omission in this case was not (*id.* at 20a-21a).

c. The court of appeals issued a brief supplemental opinion in response to the government's petition for rehearing (App., *infra*, 30a-33a). The court stated that "while any language [in its opinion] categorizing" the

FmHA's publicity directive "as a regulation may have been overbroad," the result reached was correct because the courts are authorized to compel agencies to comply with their "internal administrative procedures" (*id.* at 32a).

4. The government then sought further review in this Court, suggesting disposition as appropriate in light of *Heckler* v. *Community Health Services*, No. 83-56, then pending. Following the Court's decision in *Community Health Services*, the Court granted the petition, vacated the court of appeals' judgment and remanded the case for further consideration in light of *Community Health Services*. *Block* v. *Payne*, No. 83-1691 (Oct. 1, 1984).

On remand the court of appeals reinstated its prior decision (App., *infra*, 1a-3a), suggesting that its judgment did not depend on application of equitable estoppel (*id.* at 2a; emphasis in original):

> We have considered the opinion of the Supreme Court [in *Community Health Services*] and conclude that it does not control the decision in the case *sub judice*. The liability of the United States Department of Agriculture in this case is based on the failure of its agency, The Farmers Home Administration, to follow law enacted by Congress and its own regulations. The plaintiffs did not seek relief based on reliance upon agency action that created an estoppel. The plaintiffs alleged and proved to the satisfaction of the district court that the agency *failed* to act in accordance with the law.

The court of appeals explained that its decision rested on the view that "government agents must be aware of the law and must obey it, just as private [parties] were required [to do] in [*Community Health Services*]." *Id.* at 2a.



## REASONS FOR GRANTING THE PETITION

The court of appeals has reinstated its holding that the Secretary of Agriculture must reopen a multi-million dollar program of emergency loans designed to provide farmers with short-term financial relief from crop and property losses suffered more than a decade ago. In so ruling, the court below barred enforcement of a published regulation, having the force and effect of law, that established April 2, 1974 as the deadline for filing applications for such loans. This Court should again grant certiorari. In light of the court of appeals' failure, on remand, to conform its judgment to this Court's relevant teaching, plenary review is now warranted.

The court of appeals' ruling conflicts with this Courts' many decisions holding that, at least in the absence of serious affirmative misconduct, the government may not be equitably estopped from enforcing valid statutory or regulatory conditions of eligibility for the receipt of public benefits. See, *e.g.*, *INS* v. *Miranda*, 459 U.S. 14, 17-19 (1982); *Schweiker* v. *Hansen*, 450 U.S. 785, 788 (1981); *INS* v. *Hibi*, 414 U.S. 5, 8 (1973); *Montana* v. *Kennedy*, 366 U.S. 308, 314-315 (1961); *FCIC* v. *Merrill*, 332 U.S. 380, 384-385 (1947). In addition, the decision below conflicts with the holding in *Heckler* v. *Community Health Services*, No. 83-56 (May 21, 1984), that estoppel claims against the government should be rejected at the threshold unless the private party "at least demonstrat[es] that the traditional elements of estoppel are present" (slip op. 9); here, petitioners have been prevented from enforcing a valid condition on the receipt of public benefits, even though respondents cannot show any detrimental change of position made in reasonable reliance on the representation of a government official.

To the extent that the court of appeals relied on the Administrative Procedure Act and the concomitant obligation of agencies to abide by their own regulations, the decision below is contrary to fundamental principles that govern remedies available for agency procedural error. It also circumvents in undisguised fashion the strictures on equitable estoppel against enforcement of valid legal requirements. This Court has recognized that an agency's violation of its own regulations does not render all ensuing agency action a nullity. *United States* v. *Caceres*, 440 U.S. 741, 753-755 (1979).

1. a. The regulations that governed the special 1974 emergency loan program as it applied in north Florida unambiguously provided: "[T]he termination date for acceptance of applications based on both physical and production losses will be April 2, 1974" (7 C.F.R. 1832.82(a) (1975); see App., *infra*, 54a). Even assuming that Congress did not establish a statutory deadline for filing applications under the 1974 emergency loan program in Section 10(c) of Pub. L. No. 93-237 (see page 8, *supra*), there can be no doubt that the deadline reflected in the regulation has the force and effect of law. Pursuant to Section 339 of the Consolidated Farm and Rural Development Act, 7 U.S.C. 1989, the Secretary of Agriculture is authorized "to make such rules and regulations [and to] prescribe the terms and conditions for making * * * loans * * * as he deems necessary" to carry out the agricultural loan programs under his supervision. Thus the Secretary was vested with authority to adopt a deadline for filing of loan applications having legislative effect. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, No. 82-1005 (June 25, 1984), slip op. 5; *Batterton* v. *Francis*, 432 U.S. 416, 425 & n.9 (1977). The Secretary explicitly invoked this substantive rulemaking authority in promulgating the regulation that contains the April 2, 1974 deadline for filing loan applications. See 7



C.F.R. Pt. 1832, Subpt. E (1975) (App., *infra*, 53a). And the deadline regulation was promulgated as a substantive rule in accordance with the requirements of the Administrative Procedure Act.[10]

The April 2, 1974 deadline for filing of emergency loan applications accordingly has "the substantive characteristics" and is the "product of [the] procedural requisites" that vest a regulation with the "force and effect of law" (*Chrysler Corp.* v. *Brown*, 441 U.S. 281, 301 (1979)). Indeed, the court of appeals seemed to acknowledge as much, describing the deadline as a "legitimate time restriction[ ] set as a prerequisite to applying for governmental benefits" (App., *infra*, 18a). Yet the court of appeals unaccountably failed to recognize that *Schweiker* v. *Hansen* controls the outcome in this case. Here, as in *Hansen*, 450 U.S. at 790, Congress "delegated to [the Secretary] the task of providing by regulation the requisite manner of application" for a government benefit. And here, just as there, a "court is no more authorized to overlook the valid regulation [governing] applications * * * than it is to overlook any other valid requirement for the receipt of benefits" (*ibid.*). See also *FCIC* v. *Merrill*, 332 U.S. at 384-385; cf. *United States* v. *Locke*, No. 83-1394 (Apr. 1, 1985), slip op. 16-17.

b. In its original opinion the court of appeals appeared to recognize that the result of its decision was to override "legitimate time restrictions" that conditioned the availability of government benefits (App., *infra*, 18a)—*i.e.*, to estop the Secretary from enforcing the

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[10] Pursuant to 5 U.S.C. 553(b)(B) and (d)(3), the agency dispensed with notice and comment and made the regulations immediately effective for good cause, explaining that such action was necessary to "implement[ ] the provisions of Public Law 93-237, and because a delay in implementing the provisions of the public law by this regulation would be contrary to the public interest." 39 Fed. Reg. 7569 (1974) (App., *infra*, 52a).

loan application deadline. The court accordingly took considerable pains to distinguish *Schweiker* v. *Hansen*, *supra*. However, the distinctions offered by the court of appeals are insubstantial.

The primary distinction, in the court of appeals' view, was that, because a loan program is involved here, "the district court's remedy does not threaten the public fisc" (App., *infra*, 21a). It is, of course, true that protection of the Treasury against unauthorized expenditures is a significant policy underlying the restrictions that govern equitable estoppel in government cases. *Community Health Services*, slip op. 11. But this Court has already rejected the distinction proffered by the court of appeals, holding that the rule forbidding any estoppel that would preclude government enforcement of the law does not depend upon a showing of adverse impact on the federal fisc. See, *e.g.*, *INS* v. *Miranda*, *supra; INS* v. *Hibi*, *supra; Montana* v. *Kennedy*, *supra*. Indeed, in *Miranda*, the court of appeals had distinguished *Hansen* on precisely the ground offered by the court below. See *Miranda* v. *INS*, 673 F.2d 1105, 1106 (9th Cir. 1982). This Court responded (459 U.S. at 19):

> The * * * distinction drawn by the Court of Appeals between this case and *Hansen* is unpersuasive. It is true that *Hansen* relied on a line of cases involving claims against the public treasury. But there was no indication that the Government would be estopped in the absence of the potential burden on the fisc.

In any event, the court of appeals' suggestion that reopening the 1974 special emergency loan program will produce no drain upon the Treasury is incorrect. First, as indicated above, the terms of the loan program included forgiveness of 50% of the borrower's



debt, up to $5,000. Accordingly, each loan issued under the reopened program is, in effect, a grant of $5,000. Extending such relief to the estimated 2500 members of the class certified in this case would cost the government $12.5 million dollars in direct outlays. See also page 24, *infra*. Second, in light of prevailing interest rates, a substantial subsidy is reflected in the 1% interest rate applicable to loans under the 1974 program. The attractiveness of these "loan" terms assures that the reopening of the program will impose substantial costs on federal taxpayers. Thus the court of appeals' decision disregards "the duty of all courts to observe the conditions defined by Congress for charging the public treasury" (*FCIC* v. *Merrill*, 332 U.S. at 385). See also *Community Health Services*, slip op. 11.

The court of appeals also reasoned that the government could be estopped here because this case involves "failure of an entire agency to follow self-imposed regulations" rather than negligence by a single employee (App., *infra*, 20a). But the rule against estoppel in government cases plainly is not limited to situations in which an individual employee acts in a manner that adversely affects the interests of an applicant for a benefit. For instance, the delay in processing a petition for adjustment of immigration status at issue in *INS* v. *Miranda* was not attributed to any employee's conduct, but was assessed on the premise that it was the act of the Immigration and Naturalization Service as a whole. 459 U.S. at 18 & n.3. Similarly, the suspension within the Philippines of a special overseas naturalization program in *INS* v. *Hibi* was ordered by the Attorney General, in consultation with the Commissioner of Immigration, and reflected the official policy of the United States. See 414 U.S. at 10-11 (Douglas, J., dissenting); see also *United States* v. *Mendoza*, No. 82-849 (Jan. 10,

1984), slip op. 2. Nonetheless, estoppel was rejected in these cases, and there is no justification for a different result here.[11]

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[11] The court of appeals also thought *Hansen* distinguishable on the additional ground that the erroneous advice of a Social Security Administration employee at issue there was "revocable"—*i.e.*, the action taken by the applicant for benefits was not irreversible. By contrast, the court reasoned, respondents could not now obtain loans under the 1974 emergency program because the application period has closed (App., *infra*, 20a-21a).

The court of appeals misapprehended the thrust of the Court's statement in *Hansen* (450 U.S. at 789), that the SSA employee's conduct "did not cause respondent to take action, cf. *Federal Crop Insurance Corp.* v. *Merrill*, *supra*, or fail to take action, cf. *Montana* v. *Kennedy*, *supra*, that respondent could not correct at any time." The Court could not have meant that the Social Security applicant's action in the wake of receiving erroneous advice had no irreversible impact upon her ability to receive benefits. In fact, although Hansen ultimately did apply for and receive Social Security Act benefits, she did not receive all of the benefits she might have received absent the erroneous advice, because the Act limited the reach of a retroactive award of benefits to a 12-month period. 450 U.S. at 786-787. Thus, the Court's observation indicated only that the conduct of the SSA employee did not prevent the applicant from filing an application for benefits that would have protected her rights to the extent permitted by the applicable time constraints established by law.

In short, the rule reflected in *Hansen* is that the courts may *not* disregard lawfully established deadlines for applying for federal benefits. Because FmHA's failure to fully publicize the terms of loans available under the special 1974 program did not prevent respondents from applying for loans, *Hansen* is controlling here. Moreover, respondents' eligibility for FmHA loans in time periods subsequent to April 2, 1974 was unaffected by the agency's conduct in 1974. The FmHA's action thus "did not cause respondent[s] to take action" or "fail to take action" that respondents "could not correct at any time" permitted by law (450 U.S. at 789). In any event, as the *Hansen* Court's citation (*ibid.*) of *FCIC* v. *Merrill* and *Montana* v. *Kennedy* indicates, it is not a requirement of the rule prohibiting estoppel that private action taken in the wake of an agency error be even partially reversible. See also *INS* v. *Hibi*, *supra*.



In sum, this Court's decisions make clear that, at least in the absence of serious affirmative misconduct, the government may not be estopped from enforcing the requirements of public law. See *INS* v. *Miranda*, 459 U.S. at 16-18; *Schweiker* v. *Hansen*, 450 U.S. at 788-790; *INS* v. *Hibi*, 414 U.S. at 8-9; *Montana* v. *Kennedy*, 366 U.S. at 315. Yet the court of appeals expressly declined to rest its decision upon a finding of affirmative misconduct (App., *infra*, 21a n.29), correctly recognizing that the case at most involved a failure to act, or "neglect" (*ibid.*; *id.* at 19a). Plainly, a mere failure to follow "affirmatively required procedure" (*ibid.*) is not the kind of misconduct that would "raise a serious question whether petitioner is estopped from insisting upon compliance with [a] valid regulation" (*Schweiker* v. *Hansen*, 450 U.S. at 790).

c. The decision of the court of appeals in also inconsistent with *Heckler* v. *Community Health Services*, *supra*. Reviewing prior decisions, the Court reiterated there that "the Government may not be estopped on the same terms as any other litigant" because if it were "unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law [would be] undermined" (slip op. 8; footnote omitted). In light of these special concerns, the Court remarked (slip op. 9) that

> when an estoppel is asserted against the Government, the private party surely cannot prevail without at least demonstrating that the traditional elements of an estoppel are present.

As rehearsed in the Court's opinion (slip op. 7 & n. 10), the traditional requisites of an estoppel claim include the claimant's justifiable reliance to his detriment upon a material misrepresentation of fact or misleading conduct by the other party. The Court held that estoppel was precluded in *Community Health Services* because

the party seeking the benefit of that doctrine had neither suffered significant detriment in reliance on the governmental conduct or statement, nor shown that its reliance was reasonable. Slip op. 9-14.

Respondents similarly have failed to satisfy the traditional requirements for application of estoppel against a private party. Even assuming that the FmHA's press release violated the publicity undertaking in the agency's regulations, respondents could not reasonably have relied on the shortfall in information as a reason for not applying for a loan before the April 2 deadline. The flaw in the agency's performance identified by the court of appeals was simply the failure of the press release to specify the favorable terms of the emergency loan program. App., *infra*, 25a.[12] But it is undisputed that the

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[12] We do not concede that the publicity given to the 1974 special emergency loan program in the north Florida disaster area failed to comport with the agency's own publicity requirements. First, the court of appeals overlooked the fact that Pub. L. No. 93-237 covered a host of subjects unrelated to the 1974 loan program. The relevant provision, Section 4, simply revived, temporarily, a program that had previously been in effect in 1972. See page 4 & note 2, *supra*. Neither the interest rate applicable to that program nor the cancellation provisions are even mentioned in Pub. L. No. 93-237. In the circumstances, the press release, which mentioned the availability of a new loan program and the pertinent deadline and advised interested persons as to how to secure more information, is entirely consistent with the publicity directive requiring that the local media be advised "of the provisions of P.L. 93-237."

Moreover, in determining whether an agency has violated its own regulations, substantial deference should be accorded to the agency's contemporaneous interpretation of the requirements in issue. *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). In this case it is demonstrable, virtually to a certainty, that the agency's publicity directive was not intended to require that the details of the loan terms be disseminated through the media. As indicated above (pages 5-6 & note 5), this directive was accompanied by a suggested news release, which was the very release actually employed in north Florida. The suggested release obviously reflected



press release disseminated to the media contained the critical information that a new program of emergency loans was available to persons who suffered crop losses in the April 1973 flooding in north Florida. See App., *infra*, 54a-55a. Plainly this information was sufficient to alert any farmer who might have been eligible and interested in securing a loan to make an appropriate inquiry concerning the precise terms of the new loan program. See *Community Health Services*, slip op. 13; *Atkins* v. *Parker*, No. 83-1660 (June 4, 1985), slip op. 15. In any event, the details of the loan program were accurately presented in their entirety in the Secretary's Federal Register notice. See *Atkins* v. *Parker*, slip op. 14; *FCIC* v. *Merrill*, 332 U.S. at 385. Accordingly, it would have been unreasonable to decide not to seek a loan because of the level of information contained in the Secretary's press release, and any reliance on respondents' part was "not the kind of reasonable reliance that would even give rise to an estoppel against a private party." *Community Health Services*, slip op. 14.

2. Although the court of appeals attempted, in its original opinion, to distinguish *Hansen* on the grounds that we have discussed, portions of that opinion can also be read to suggest that the judgment rests upon a different principle, independent of equitable estoppel. That is, the court of appeals portrayed its order mandating the reopening of the 1974 special emergency loan

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the agency's contemporaneous understanding of the publicity requirement. The finding of agency noncompliance with its own regulations is thus untenable. Commenting on essentially identical facts in *Emergency Disaster Loan Ass'n, Inc.* v. *Block*, 653 F.2d 1267 (9th Cir. 1981), Judge Boochever stated (*id.* at 1272 (concurring opinion)):

> While that release did not set forth some of the material provisions of the new law, it is not disputed that the state officials sent out news releases embodying the provisions of the suggested one. There was thus substantial compliance with the directive.

program as a routine exercise of judicial authority under the Administrative Procedure Act to require an agency to abide by its own regulations (App., *infra*, 13a-14a n.20, 19a, 21a-22a & n.29). The court of appeals underscored this aspect of its reasoning in its supplemental opinion on denial of rehearing (*id.* at 31a). And following this Court's remand for further consideration, the court of appeals concluded that *Community Health Services* shed no light on this case because "the plaintiffs did not seek relief based on reliance upon agency action that created an estoppel" (*id.* at 2a). The court of appeals' analysis is insupportable, however; the relief awarded here is indistinguishable from estoppel and finds no sanction in the APA or in the corollary doctrine that agencies are generally required to abide by their own regulations.[13]

The APA creates no loophole in the doctrine restricting application of equitable estoppel against the United States. To be sure, "in cases * * * brought under the APA" or in similar contexts the Court has held that "[a]gency violations of their own regulations * * * may well be inconsistent with the standards of agency

[13] We note, initially, that this suit cannot be considered one for judicial review of final agency action pursuant to 5 U.S.C. 702 and 704. See *FTC* v. *Standard Oil Co.*, 449 U.S. 232 (1980). Respondent Payne sought and received a loan under the 1974 emergency loan program (see page 6 note 8, *supra*). With that single exception, there is no allegation that either the other representative plaintiff or any member of the class has ever applied—even tardily—to the FmHA for a loan under the program. Nor has any respondent otherwise requested that the agency waive the April 2, 1974 loan application deadline. This is not a mere failure to exhaust rights of administrative appeal. Respondents simply have not at any point been subjected to reviewable agency action. See *Mathews* v. *Eldridge*, 424 U.S. 319, 328 (1976). As a result, there is no record on which the court of appeals could have determined the reasonableness of agency action. In the circumstances it is difficult to conclude that the relief awarded here is authorized by the APA.



action which the APA directs the courts to enforce." *United States* v. *Caceres*, 440 U.S. 741, 754 (1979) (footnote omitted); see also *id.* at 751 n.14.[14] The question in this case, however, is not whether the Secretary could be directed by a court to carry out his own publicity directive (at a time when the program was still in effect), but whether the courts below had authority to reopen the loan program, which had, by its terms, expired.

None of this Court's decisions requiring an agency to abide by its regulations suggests that relief of the latter kind is permissible. Rather, in each of these cases, the agency had sought to deny an individual a benefit to which he was entitled by law, or to deprive a person of a position lawfully occupied, in a procedurally irregular manner; the relief sought was simply the setting aside of that agency action.[15] The line of authority invoked by the court of appeals simply does not indicate that a court may disregard valid, legally effective limitations upon eligibility for benefits because of agency violations of self-imposed regulations unrelated to the validity of the eligibility limitations. Indeed, *Caceres*, which holds that evidence secured in violation of agency regulations is not subject to the exclusionary rule, makes clear that a violation of agency regulations does not render all ensuing agency action a nullity.

[14] See, *e.g.*, *Service* v. *Dulles*, 354 U.S. 363, 388 (1957); *Vitarelli* v. *Seaton* 359 U.S. 535, 539-540 (1959); see also *Morton* v. *Ruiz*, 415 U.S. 199, 235 (1974); *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260, 267 (1954); but see *American Farm Lines* v. *Black Ball Freight Service*, 397 U.S. 532, 538-539 (1970).

[15] In *Morton* v. *Ruiz* the agency had denied benefits to an applicant on the basis of a regulation that was defectively promulgated. The Court declined to accord legislative effect to the regulation because the APA itself specifies the sanction of unenforceability for such regulations. See 415 U.S. at 231-235.

The relief awarded in this case simply does not resemble that made available in prior cases and is not authorized by the APA. To reopen a long expired emergency loan program, in the face of a valid regulation establishing a deadline for filing of applications, because of a finding of noncompliance with unrelated agency requirements covering the program is not to "compel agency action unlawfully withheld" (5 U.S.C. 706(1)). Under that provision a court might well have enjoined the FmHA to comply with its own publicity directives. But the relief awarded here is not of that nature. Reopening the loan program also is not "invalidation of agency action that is arbitrary, capricious, an abuse of discretion, * * * not in accordance with law * * * [or] taken 'without observance of procedure required by law'" (*United States* v. *Caceres*, 440 U.S. at 753-754 (quoting 5 U.S.C. 706(2)). The court of appeals did not suggest that the agency's regulation establishing the April 2, 1974 deadline was deficient in any of these respects when adopted. Instead, the court appears to have concluded (App., *infra*, 18a-19a) that, in light of subsequent developments, it was unreasonable for the agency to fail to waive its own deadline, and that a court could accordingly direct it to do so.[16]

This reasoning is fundamentally at odds with *Schweiker* v. *Hansen* and *FCIC* v. *Merrill*. Applying the reasoning of the decision below, this Court should have held in *Hansen* that the Social Security Administration acted unreasonably in refusing to waive the written application requirement established by agency rules, in light of its employee's violation of the SSA Claims Manual. And the Court should have held in

[16] As noted earlier (see page 20 note 13, *supra*), the court of appeals overlooked the fact that none of the respondents had ever asked the agency to waive or extend the application deadline.



*Merrill* that the Federal Crop Insurance Corporation was required to waive the provisions of its regulations precluding issuance of insurance upon crops planted on reseeded acreage, in light of its employee's failure to give correct advice.

Of course, these were not the rulings of this Court. The strictures upon application of equitable estoppel to the United States established by this Court's decisions cannot be circumvented by manipulating doctrinal labels in the fashion employed by the court of appeals. In analytical terms, the decision of the court below inescapably rests upon principles of estoppel: in reopening the 1974 emergency loan program, the court below barred enforcement of the legally enforceable deadline for filing loan applications. Thus, this is a case in which "the Government [has been prevented from] enforc[ing] the law because [of] the conduct of its agents" (*Community Health Services*, slip op. 8). And the policy considerations that underlie the no-estoppel ruie—"the interest of the citizenry as a whole in obedience to the rule of law" and "[p]rotection of the public fisc" (*Community Health Services*, slip op. 8, 11)—are fully applicable here. Finally, the remedy afforded may also be identified as an estoppel because it possesses the classic identifying trademark of that doctrine: it "prevent[s] the one against whom it operates from pleading the truth" (Restatement (Second) of Agency § 8B, comment a (1958))—here, the expired filing deadline for emergency loan applications. In sum, the authority available to a court under the APA to require agency obedience to regulations does not extend to preventing the government from enforcing a separate lawful condition upon the receipt of federal benefits.

3. The decision of the court of appeals predictably will trigger a flood of applications from farmers primarily interested in obtaining a $5,000 grant and/or a loan at interest rates far below those otherwise available.

As we have noted, the result will be costly indeed for the United States. Furthermore, the cost will be greatly magnified if the unsuccessful intervenor in this case succeeds in extending the court of appeals' ruling to benefit a nationwide class in his separate action pending in district court in Georgia (see page II, *supra;* App., *infra*, 27a-29a & n.42).

Reopening the 1974 special emergency loan program will also produce substantial administrative costs and burdens. It plainly will be difficult to determine at this late date whether any individual applicant suffered losses in 1973 and what the extent of any losses were. The filing deadline overridden by the court of appeals thus is, like the written application requirement that the Court vindicated in *Hansen*, 450 U.S. at 790, "essential to the honest and effective administration" of the program.

Nor will reopening the 1974 special emergency loan program a decade after its expiration serve the objectives of that program. The emergency loan program was precisely drawn by Congress to benefit only those farmers who had suffered losses from natural disasters in the brief period between December 1972 and April 1973. See page 4, *supra*. The purpose of the special loans was to tide farmers over from the immediate shock of those losses, "in order that they may continue their future farming or livestock operations with credit from other sources" (7 C.F.R. 1832.81 (1975) (App., *infra*, 53a)). Actual losses rather than future needs provided the standard for eligibility.[17] The judgment of the district court, as affirmed by the court of appeals, accordingly requires that loans be made under the reopened program based upon the applicant's eligibility as of 1974, without regard to whether any current need exists. But there is no reason to believe that those who suffered losses in 1973 have unredressed needs for emergency loan assistance today. Conversely, any need that might exist today in a particular case cannot realistically be traced to the 1973 north Florida flooding.

[17] Emergency loans based on the April 1973 disaster were available "to reimburse applicants for production expenses which went into damaged or destroyed crop and livestock enterprises," but were not available for the purpose of "produc[ing] new crops during 1974." 7 C.F.R. 1832.86(a), at 39 Fed. Reg. 7573 (1974).



Thus, the remedy afforded by the court of appeals resembles nothing so much as an unauthorized award of damages against the United States. See *United States* v. *Testan*, 424 U.S. 392, 400 (1976).[18] *Community Health Services* makes clear (slip op. 9) that the equitable estoppel doctrine may not be employed to exact such windfall benefits from the Treasury. Because the court below imposed these substantial and unjustifiable burdens on the agency and on the federal fisc in disregard for this Court's pertinent decisions, further review is warranted.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 1985

[18] We note that the APA does not provide a cause of action for money damages. 5 U.S.C. 702.

**APPENDIX A**

# UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

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No. 81-5365

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RONALD E. PAYNE, INDIVIDUALLY AND ON BEHALF OF HIMSELF AND OTHERS SIMILARLY SITUATED, PLAINTIFFS-APPELLEES,

*v.*

JOHN R. BLOCK, INDIVIDUALLY AND AS SECRETARY OF THE UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL., DEFENDANTS-APPELLANTS,

*v.*

JAMES J. COLLINS, MOVANT-APPELLANT-INTERVENOR.

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Appeals from the United States District Court for the Middle District of Florida

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On Remand from the Supreme Court of the United States

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JAN. 31, 1985.

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Before GODBOLD, Chief Judge, HENDERSON and CLARK, Circuit Judges.

PER CURIAM:

On October 1, 1984, the United States Supreme Court vacated our decision in this case, 714 F.2d 1510 and 721 F.2d 741, and remanded, ___ U.S. ___, 105 S.Ct. 65, 83 L.Ed.2d 15. We were directed to reconsider our decision in light of *Heckler* v. *Community*

*Health Services of Crawford County, Inc.*, 467 U.S. ___, 104 S.Ct. 2218, 81 L.Ed.2d 42 (1984).

The question presented in *Heckler, supra* was "whether the government is estopped from recovering these funds because respondent relied on the express authorization of a responsible government agent in making the expenditures." *Id.* 104 S.Ct. at 2220. The respondent community agency received CETA funds with which it hired extra employees to provide additional home health care services for Medicare patients. It billed the Medicare program for these same employee salaries upon advice of a government agent that CETA funds were "seed money" properly reimbursable within the meaning of the Provider Reimbursement Manual. This advice proved erroneous and the government sought recovery of the funds. The Supreme Court held that the government was not estopped from recovering the funds in question since the respondent had not demonstrated that the traditional elements of an estoppel were present. *See* 104 S.Ct. at 2226 and notes 17-21.

We have considered the opinion of the Supreme Court and conclude that it does not control the decision in the case *sub judice*. The liability of the United States Department of Agriculture in this case is based upon the failure of its agency, The Farmers Home Administration, to follow law enacted by Congress, and its own regulations. The plaintiffs did not seek relief based on reliance upon agency action that created an estoppel. The plaintiffs alleged and proved to the satisfaction of the district court that the agency *failed* to act in accordance with the law. Holding that government agents must be aware of the law and must obey it, just as private agencies were required in *Heckler, supra*, we abided by the opinions of the Supreme Court in *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954) (Board of Immigration Appeals must afford that due process required by the regulations) and *Morton* v. *Ruiz*, 415 U.S. 199, 235, 94



S.Ct. 1055, 1074, 39 L.Ed.2d 270, 293 (1974) ("Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required." 415 U.S. at 235, 94 S.Ct. at 1074).

Having carefully reviewed our prior opinions and the opinion in *Heckler* v. *Community Health Services, supra*, we adhere to our prior decision which is hereby reinstated.

The decision of the district court is

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT

No. 81-5365

RONALD E. PAYNE, INDIVIDUALLY AND ON BEHALF OF HIMSELF AND OTHERS SIMILARLY SITUATED, PLAINTIFFS-APPELLEES,

*v.*

JOHN R. BLOCK, INDIVIDUALLY AND AS SECRETARY OF THE UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL., DEFENDANTS-APPELLANTS.

*v.*

JAMES J. COLLINS, MOVANT-APPELLANT-INTERVENOR

Appeals from the United States District Court for the Middle District of Florida

SEPT. 19, 1983

Before GODBOLD, Chief Judge, HENDERSON and CLARK, Circuit Judges.

CLARK, Circuit Judge:

Beginning about April 1, 1973, thirteen north Florida counties received a series of torrential rains resulting in flooding, crop damage, and property damage.[1] Pursu-

[1] The counties involved were Baker, Columbia, Dixie, Gilchrist, Hamilton, Jefferson, Lafayette, Leon, Levy, Madison, Nassau, Suwannee, and Wakulla. 39 Fed.Reg. 14800 (1973).



ant to the Disaster Relief Act of 1970,[2] the President, on May 26, 1973, declared the aforementioned area a major disaster area.[3] 38 Fed.Reg. 14800 (1973). The Farmers Home Administration (FmHA) was authorized and funded by the Consolidated Farm and Rural Development Act, 7 U.S.C. sections 1961-69, to make emergency loans in this thirteen-county area.[4] Originally the application period for production losses was nine months (ending February 26, 1974) and for property damage was sixty days (ending July 30, 1973). Apparently, crop losses are allowed a longer filing period because of the inability to determine the extent of loss prior to harvest and sale. The initial terms of the emer-

[2] Pub.L. No. 91-606, 84 Stat. 1744 (1970) (repealed or transferred 1974).

[3] Emergency Loan Major Disaster Designation M345. Plaintiffs' Exhibit 8A. A presidentially declared disaster was normally coordinated by the Office of Emergency Planning (OEP). Record Vol. 10 at 1072. (OEP is also referred to as the Office of Emergency Preparedness.)

[4] The Act provides:

> (b) The Secretary shall make loans in any such area designated by the Secretary in accordance with subsection (a) of this section and in any area designated as a major disaster by the President pursuant to the provisions of the Disaster Relief Act of 1970, as amended, (1) to established farmers, ranchers, or oyster planters who are citizens of the United States and (2) to private domestic corporations or partnerships engaged primarily in farming, ranching, or oyster planting: *Provided*, That they have experience and resources necessary to assure a reasonable prospect for successful operation with the assistance of such loan, and are unable to obtain sufficient credit elsewhere to finance their actual needs at reasonable rates and terms, taking into consideration prevailing private and cooperative rates and terms in the community in or near which the applicant resides for loans for similar purposes and periods of time.

Pub.L. No. 87-128, 75 Stat. 311 (codified as amended at 7 U.S.C. sec. 1961(b) (1973)).

gency loans included a 5% per annum interest rate and a provision requiring applicants to show an inability to obtain credit from commercial lenders.[5]

Ronald E. Payne, a farmer in one of the designated counties, brought a class action suit against the FmHA, United States Department of Agriculture, seeking injunctive relief to secure for himself and all similarly situated farmers in the area the right to apply for emergency loans.[6] Plaintiffs alleged inadequate notice of the availability of loans due to FmHA's failure to adhere to its own regulations providing for appropriate notice.[7]

The applicable FmHA regulations in effect during this initial loan application period included provisions prescribing notice of the availability of loans to eligible area farmers. The Code of Federal Regulations contained the following section:

[5] Pub.L. No. 93-24, sections 3, 4, 87 Stat. 24 (codified as amended at 7 U.S.C. sections 1961(b), 1964 (1973)).

[6] The original class was recertified as:

> All farmers in the thirteen county area covered by the Disaster Declaration M-345 who: 1) suffered damage from floods or severe storms in the major natural disaster declared by the President on May 26, 1973; and who 2) were eligible to apply for emergency disaster loans administered by the Farmers Home Administration pursuant to 7 C.F.R. sec. 1832 (1974), and 3) who were not notified that they were eligible to apply for emergency loans.

Record Vol. 3 at 114.

[7] The complaint as originally filed contained an action for money damages. Record Vol. 1 at 1. The district court dismissed that count, and plaintiff appealed. Record Vol. 1 at 50, 56. The appellate court dismissed the appeal for lack of a Rule 54(b) order. Record Vol. 1 at 59. Plaintiff did not file a new notice of appeal (cross-appeal) following final judgment in this case, and, thus, that count is not before us.



> (a) [T]he State Director [of the FmHA] will notify the appropriate County Supervisors immediately and instruct them to make EM loans available under sec. 1832.13. His notification will be confirmed by State requirements issued as soon as possible. The State Director will also notify the USDA Defense Board Chairman and will make such public announcements as appear appropriate.
>
> (1) Immediately upon receiving notice about the counties under this jurisdiction, the County Supervisor will notify the appropriate County USDA Defense Board Chairman and make such public announcements as appear appropriate about the availability of EM loans under sec. 1832.13. Also, the County Supervisor will explain to other agricultural lenders in the area the assistance available under this program.

7 C.F.R. sec. 1832.3(a)(1) (1973). The alleged failure of the agency to comply with the regulation is the gravamen of the original complaint.

Regarding announcement of the availability of emergency loans in designated disaster areas, Claude Greene, State Director of FmHA, issued notification to all county supervisors in the affected area.[8] On June 4, 1973, Greene also sent a sample press release to the county supervisors with instructions to "use it as soon as possible." The release stated that applications should be submitted prior to July 30, 1973; it totally omitted any reference to the nine-month period, expiring February 26, 1974, in which to apply for production losses. The release was routinely forwarded to the local media.

[8] Greene sent a letter dated May 31, 1973 to the county supervisors. Plaintiffs' Exhibit 8. The letter briefly outlined emergency loan availability.

However, county officials made no follow-up to determine whether the press release was published. Several newspapers carried information concerning the FmHA program, but only one printed the release in full and others contained erroneous information in addition to omitting notice of the longer application period for crop loans.

The President's Office of Emergency Preparedness coordinated a week-long public meeting at the Live Oak, Florida, Coliseum in early June 1973. Various government agencies set up booths each manned by an agency representative for the purpose of supplying information regarding the available disaster relief programs.[9] The FmHA booth was manned by an agency representative for a short period of time and by a volunteer the remaining time. Apparently, the volunteer was without knowledge of or familiarity with FmHA programs generally or this emergency program specifically. Several farmers attending the the meeting testified that they were told no relief was available for farmers who had sustained crop losses but only for those

[9] The agencies involved included the four agencies within the Department of Agriculture—FmHA, Soil Conservation Service, Agricultural Stabilization and Conservation Service, and Extension Service. FmHA functions as a credit agency for farmers. Soil Conservation Service provides technical assistance to farmers in developing conservation services or practices. Agricultural Stabilization and Conservation Service makes grants for conservation practices and controls production of controlled crops. Extension Service subsidizes the state agricultural service which provides technical and informational services to farmers. Representatives from these agencies comprise the USDA Defense Board which functions to provide information and coordinate USDA programs in times of emergencies. *See generally* Record Vol. 5 at 134-37.



who had sustained damage to their homes. Record Vol. 5 at 207, 228, 267-68; Vol. 8 at 589. Moreover, testimony indicated that FmHA officials were aware of the losses suffered as a result of the flooding. Record Vol. 8 at 684-86. The FmHA maintains that handout materials about the emergency loans and application forms were available at the meeting. However, the FmHA processed no applications and granted no emergency loans in this thirteen-county area during the 1973 loan period.

The government contends that no loans were made during this period because of credit available elsewhere. However, many of these lenders, such as the Small Business Administration, did not extend loans for *crop* losses. Record Vol. 10 at 1071. The government also asserts that the actual damage sustained by area farmers was much less than originally estimated.

On January 2, 1974, the President of the United States signed Public Law No. 93-237,[10] which extended the application period for emergency loans to April 2, 1974. The new law provided for more attractive loan terms [the interest rate was dropped to 1% and the first $5,000 was forgiven] and eliminated the requirement that loan applicants be unable to obtain sufficient credit elsewhere. Notice of the reopened application period was not published in the Federal Register until February 27, 1974, so that two-thirds of the extended application period had expired.[11] The regulations provided that the county supervisor was to prepare a list of paid-up and indebted borrowers who had received emergency loans, notify each person on the list of the

[10] 87 Stat. 1023 (1974).

[11] 39 Fed.Reg. 7569 (1974).

new terms, and determine if that person was eligible for any benefit under the new terms of the loan. Since no one filed an emergency loan application during the first application period, no letters were sent.

The new regulation also stated that "State Directors will issue an instruction setting forth this information [regarding Public Law No. 93-237] for use in their respective states. State Directors and County Supervisors will inform the news media including newspapers, radio, and television in the affected counties of the provisions of P.L. 93-237." 39 Fed.Reg. 7570 (1974). On February 28, 1974, the state director issued a memorandum and sample press release to all county supervisors.[12] The sample press release stated that loan applications would be taken under the terms of the new law. Contrary to the mandate of the regulation, the release did not recite the terms of Public Law No. 93-237. The press release was routinely forwarded to the local media but received little publication. No other efforts at notification were undertaken.[13] Only three or four loans were granted during this second period. Plaintiffs attack the agency's failure to comply with this regulation as the second prong of their inadequate notice argument.

Inquiring into possible reasons or motivations for this failure to provide notice and, thus, ultimately to grant loans, we are acutely aware of the historical background of the case. The political climate of the early 1970s was one of considerable struggle between the ex-

[12] Plaintiffs' Exhibit 21.

[13] The complaint refers to a one-day public meeting in Suwannee County on or around March 14, 1974. Complaint ¶ 15.



ecutive and legislative branches of government. Congress appropriated monies for various programs and the executive branch refused to spend the funds on those it considered unwise. Several impoundment cases arose,[14] hearings were held,[15] and statutes were passed.[16] As indicated earlier, in the area of agriculture Congress had passed very generous loan legislation. Pub.L. No. 92-385, 86 Stat. 554 (1972). The Secretary of Agriculture, however, by administrative fiat curtailed the grant of these loans. Injured farmers in Minnesota filed suit against the Secretary of Agriculture seeking reinstatement of the program. They alleged that the Secretary acted unlawfully and beyond the scope of his authority in terminating the FmHA emergency loan program. The district court agreed, finding the Secretary's action in violation of applicable statutes, departmental regulations, and due process of law. *Berends* v. *Butz*, 357 F.Supp. 143 (D.Minn.1973).

At the congressional hearings on Impoundment of Appropriated Funds by the President, then-Secretary Butz testified that in an effort to reduce spending his agency examined existing programs and withheld funds

[14] *E.g.*, *Train* v. *City of New York*, 420 U.S. 35, 95 S.Ct. 839, 43 L.Ed.2d 1 (1975); *Berends* v. *Butz*, 357 F.Supp. 143 (D.Minn.1973).

[15] *E.g.*, Impoundment of Appropriated Funds by the President: Joint Hearings Before the Ad Hoc Subcomm. on Impoundment of Funds of the Senate Comm. on Government Operations and the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 93d Cong., 1st Sess. (1973).

[16] Congressional Budget and Impoundment Control Act of 1974, Pub.L. No. 93-344, 88 Stat. 298 (codified as amended at 2 U.S.C. sec. 621 *et seq.* (1983)).

from those it found "least essential."[17] The decisions were made on the basis of "subjective judgment."[18] In response to the "termination" of the emergency loan program and in order to assure reinstatement of the program, Congress repealed 92-385 to the extent of its generous loan terms. Pub.L. No. 93-24, 87 Stat. 24 (1973). Congress also provided for the applicability of the terms of 92-385 to previously declared disasters. *Id.*; Pub.L. No. 93-237, sec. 4, 87 Stat. 1023 (1974). In an apparent attempt to persist in executive budgetary goals, the agency then merely withheld appropriate notice of the loan program.

Following a bench trial in the instant case, the district court issued an order and opinion on February 11, 1981 finding that the notice of the emergency loan program was insufficient to comport with the applicable regulations providing that the state director and county supervisors "make such public 'announcements as appear appropriate." 7 C.F.R. sec. 1832.3(a)(1) (1973). The district court also found that specific types of notice provided for in the regulations were not effectuated. *Id.* Judgment was entered for the plaintiff and the recertified class with the court ordering the FmHA to reopen the 1973-74 emergency loan program in the designated counties and the parties to submit a plan for notification of class members. A plan was submitted and accepted, and the district court denied defendants'

[17] Impoundment of Appropriated Funds by the President: Joint Hearings Before the Ad Hoc Subcomm. on Impoundment of Funds of the Senate Comm. on Government Operations and the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 93d Cong., 1st Sess. 532 (1973).

[18] *Id.* at 554.



motion for suspension of injunction pending appeal. Defendants filed an appeal and ultimately obtained in this court a stay of the injunction pending appeal in this court. An amended final judgment adding a second class representative as party plaintiff was later entered.[19] Record Supp. Vol. 1 at 4.

On appeal, the government contests the authority of the district court to reopen the emergency loan program and contends that the original public notice was sufficient. Upon review of these issues and the evidence presented, we affirm the district court.[20]

[19] During trial, plaintiff moved to add six parties plaintiff. Record Vol. 3 at 102 and Vol. 8 at 772-75. The district court stated that the motion would be granted. Record Vol. 10 at 1203. The final judgment, however, mentioned only Payne and the recertified class. Record Vol. 3 at 114.

Originally, appellant maintained plaintiff Ronald Payne's lack of standing to challenge the adequacy of notice and seek reopening of the loan program. *See* Brief for Appellant at 24-26. Appellant reasoned that because Payne had actual notice of the FmHA program and received a loan thereunder (*see* Complaint ¶¶ 14, 23, 25-32), he could demonstrate no injury in fact.

Plaintiffs then sought a limited remand for the purpose of entering an amended final judgment. This court granted appellees' motion for limited remand, Record Supp. Vol. 1 at 3, and the district court entered an amended final judgment adding a second named class representative to the list of prevailing plaintiffs. Record Supp. Vol. 1 at 4-5. Thus, we find the standing issue moot. (We note that the government apparently abandoned the standing issue. The government's reply brief on this issue placed great emphasis on the fact that at that time the parties seeking to intervene as named representatives had not sought to have the court amend its judgment to include them. The standing issue was not mentioned at oral argument.)

[20] We accept jurisdiction pursuant to 28 U.S.C. sec. 1291. The scope of our review is set out in Section 10 of the Administrative Procedure Act, 5 U.S.C. sec. 701 *et seq.* Section 706 provides in pertinent part:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of

*Propriety of the District Court Remedy*[21]

The government's primary position in this case is that the 90-day extension of Public Law No. 93-237 constitutes a legislatively enacted termination date of the benefits of 93-237 and as such deprives the agency of the authority to reopen the loan application process. Thus, assuming a failure to notify, the agency is left in the absurd position of arguing that it can disobey a congressional mandate to make loans available to eligible farmers but has no authority to make the loans in cases of inadequate notice of availability because Congress did not mandate an extension of time for those cases. The government maintains that since the statutory deadline for seeking assistance has long since expired, no statutory authority exists, as is needed, for making emergency loans under the terms of that program at this time. The government does not contend that *funds*

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law, interpret constitutional and statutory provisions, and determine the meaning of [sic] applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

5 U.S.C.A. sec. 706 (1977).

[21] This issue presupposes inadequacy of notice and goes only to the *remedy*. The issue of notice is discussed *infra*.



are no longer available for these emergency loans,[22] just that no *authority* exists to expend them for this disaster absent a timely filed application.

The government's initial brief chiefly relied on the Ninth Circuit's decision in *Emergency Disaster Loan Association, Inc.* v. *Block*, 653 F.2d 1267 (9th Cir.1981). Although based upon a similar factual setting, we find the case inapposite. The Ninth Circuit case failed to consider the regulation published on February 27, 1974 requiring notice to prior applicants and the news media. The court considered only an earlier internal Special Instruction which embodied the same terms but, as such, was found to be discretionary. As was apparently the case in the Ninth Circuit, the government in this case failed to bring to our attention the notice provision in the above-mentioned regulation. The government's reply brief, however, did footnote the error contained in its main brief. An additional distinction between the Ninth Circuit case and the instant one is that there the plaintiffs sought mandamus. The Ninth Circuit denied that relief since the instruction was discretionary and thus unenforceable in an action for man-

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[22] Originally, the Emergency Credit Revolving Fund was established for carrying out the purposes of the Consolidated Farm and Rural Development Act. 7 U.S.C. sec. 1966 (1973). That fund was later abolished and its assets, liabilities, and authorizations transferred to the Agricultural Credit Insurance Fund, also a revolving fund. 7 U.S.C. sec. 1929(g)(1) (1973). *See also* Record Vol. 5 at 119-121. *See generally Berends* v. *Butz*, 357 F.Supp. 143, 155-56 (D.Minn.1973). In *Berends*, Minnesota farmers sought reinstatement of the administratively curtailed national emergency loan program. The court discussed the revolving loan fund and rejected the government's assertion of shortage of funds as justification for termination of the program.

damus. *See generally United States ex rel. McLennan* v. *Wilbur*, 283 U.S. 414, 420, 51 S.Ct. 502, 504, 75 L.Ed. 1148 (1931).

Traditionally, the Secretary of Agriculture declared as a matter of policy the duration of application periods for emergency loans.[23] Public Law 93-237 maintained that policy, *see* 39 Fed.Reg. 7570 (1974) ("Termination dates for any new counties that might be designated after January 2, 1974, will follow the current policy (60 days for physical losses and 9 months for production losses)."), but provided that for "all disasters occurring on or after December 27, 1972, the Secretary of Agriculture shall extend for ninety days after the date of enactment of this [statute] the deadline for seeking assistance under ... the Consolidated Farm and Rural Development Act." Public Law No. 93-237, sec. 10(c), 87 Stat. 1023 (1974). Thus, an extended termination date of April 2, 1974 was set for the acceptance of applications for all losses resulting from the instant disaster. 39 Fed.Reg. 7570 (1974).

This "statutory" reopening of the application period was a result of contemporary changes in the disaster relief laws which caused public uncertainty as to the

[23] The 60-day time limit is a commonly used application period. The Small Business Administration (SBA), an agency also participating in disaster relief loans, used a 60-day deadline. Record Vol. 10 at 1081-82. SBA's district director testified that his agency could extend the filing period. *Id.* FmHA's nine-month application period for production losses was apparently made pursuant to a verbal agreement between FmHA and the Office of Emergency Preparedness. *See* Record Vol. 5 at 79-81; Plaintiffs' Exhibit 17. These time periods were measured from the date of the disaster declaration. *See* Plaintiffs' Exhibit 17.



terms of emergency loans.[24] Congress was "concerned that administratively set deadlines ... set by the [FmHA] ... may expire, thus precluding ... farmers ... from applying for benefits under [93-237]." Conf. Rep. No. 93-363, 93d Cong., 1st Sess. 2, *reprinted in* 1973 U.S.Code Cong. & Ad. News 3342, 3343. Thus, Congress indicated its expectation that the FmHA would extend the deadline for seeking relief for previously declared disasters as a result of the enactment of 93-237. Conf.Rep. No. 93-363, 93d Cong., 1st Sess. 2, *reprinted in* 1973 U.S.Code Cong. & Ad.News 3342,

[24] In 1972, Congress passed Public Law No. 92-385, 86 Stat. 554 (1972). Section 328 of that amendment to the Consolidated Farmers Home Administration Act of 1961 (renamed as the Consolidated Farm and Rural Development Act by Public Law No. 92-419, 86 Stat. 657 (1972)) provided for generous emergency loan benefits. "Loans under this program were curtailed by the Department of Agriculture on December 27 [1972] for budgetary reasons, due in part to the forgiveness features and low interest rates provided for by Public Law 92-385." Senate Report No. 93-85, 93d Cong., 1st Sess. 1, *reprinted in* 1973 U.S.Code Cong. & Ad.News 1285, 1285. In order to reinstitute the much needed emergency loan program for farmers while avoiding the excessive costs inherent in section 328, Congress repealed section 328 as amended by Public Law No. 92-385 on April 20, 1973. Pub.L. No. 93-24, 87 Stat. 24 (1973). The 1973 act stated that the generous terms of section 328 were to remain applicable to disaster designations made after January 1, 1972 and before December 27, 1972 with applicants having 18 days to apply for loans. This created a hiatus between December 27, 1972 and April 20, 1973, the date of the repealing legislation, as to what type benefits to apply during that four-month period. Congress resolved that problem by enacting Public Law No. 93-237 on January 2, 1974. Pub.L. No. 93-237, 87 Stat. 1023 (1974). Disasters during the hiatus were to be treated in accordance with the generous terms of section 328 as amended, with applicants having 90 days to apply for loans. Pub.L. No. 93-237, sec. 4, 87 Stat. 1023 (1974).

3343-44. This expectation was incorporated into the statutory language. Pub.L. No. 93-237, sec. 10(c), 87 Stat. 1023 (1974).

The materials cited above clearly demonstrate Congress' concern that the benefits of the emergency loan program be extended to all eligible farmers and that they have ample opportunity to derive benefits therefrom. The "statutory" deadline was inserted merely to insure agency adherence to congressional intent. The extension operated as a congressional demand to the Secretary of Agriculture to extend the application period.[25] To equate the "statutory" extension to a congressional termination of benefits overlooks the context in which the act was passed. No statutory authorization is required, as the government here contends, for the Secretary to extend deadlines merely because Congress inserted a deadline in a disaster relief law which originally was designed to remedy a Secretarial curtailment of loan grants. *See* Sen.Rep. No. 93-85, 93d Cong., 1st Sess. 1, *reprinted in* 1973 U.S.Code Cong. & Ad. News 1285. Application deadlines are normally administratively prescribed. FmHA's application period is a policy decision of that agency and expandable by the agency. We do not condone the failure of potential loan applicants to follow legitimate time restrictions set as a prerequisite to applying for governmental benefits. However, we do find that where, as here, exigent circumstances beyond the farmers' control precluded intended beneficiaries from applying for loans, the agency

[25] "[T]he *Secretary* of Agriculture *shall extend* for ninety days after the enactment of this section the *deadline* for seeking assistance...." Pub.L. No. 93-237, sec. 10(c), 87 Stat. 1023 (1974) (emphasis supplied).



had the power to extend the loan period and the district court was within its power in ordering the agency to do so. To hold otherwise would allow FmHA to totally fail to provide notice to congressionally intended potential beneficiaries and avoid being called to task for such conduct.[26]

The liability of the agency in this case is grounded in Congress' enactment of legislation directing the Department of Agriculture to implement the terms of the legislation, the agency's passage of implementing regulations, and the agency's failure to follow the resulting affirmatively required procedure. *See generally United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954); *United States* v. *Heffner*, 420 F.2d 809 (4th Cir.1970). An agency must follow its own procedure even though the procedure is more stringent than would constitutionally be required. *Morton* v. *Ruiz*, 415 U.S. 199, 235, 94 S.Ct. 1055, 1074, 39 L.Ed.2d 270, 293 (1974). The FmHA regulations in issue are not merely statements of agency policy. The notice provisions were all promulgated in the Code of Federal Regulations and constituted rules of procedure governing emergency loan programs legislated and funded by Congress. FmHA must adhere to those rules.

We reject FmHA's contention that *Schweiker* v. *Hansen*, 450 U.S. 785, 101 S.Ct. 1468, 67 L.Ed.2d 685 (1981) (per curiam), controls this case. In *Schweiker* v. *Hansen*, a Social Security employee erroneously in-

[26] We emphasize that Congress had previously invoked, and "expected" FmHA would invoke, a similar reopening remedy in 93-237 when potential beneficiaries of the program were confused as to the program's terms.

formed an inquiring claimant of her ineligibility for government benefits, resulting in her failure to file an application. A written application was a prerequisite to receiving benefits. An internal claims manual instructed agents to recommend such a filing to uncertain inquirers. Upon a later filing and receipt of the benefits in issue, plaintiff brought suit to estop the Secretary of Health and Human Services from denying complete retroactive benefits for the period in which plaintiff was eligible but had not filed a written application. The Court found estoppel inapplicable to the case since an internal instruction is not a binding regulation, plaintiff was able to correct the misrepresentation, and the estoppel would threaten the public fisc.

In *Hansen*, the claimant was negligent in failing to file an application and the agency employee was negligent both in failing to instruct her to file and in advising her of ineligibility. The present case is not an instance of a single government employee negligently failing to follow intra-office procedure and an agency nevertheless insisting on adherence to its regulations. This is not a case of a negligent plaintiff.[27] Rather, this is a case of gross failure on the part of an entire agency to follow self-imposed regulations prescribing adequate notice to potential applicants. Additionally, the error in *Hansen* was revocable. By filing an application on any subsequent day, the claimant could have corrected the error

[27] Neither is it merely a case of an agency disseminating incorrect information, *Augusta Aviation, Inc.* v. *United States*, 671 F.2d 445 (11th Cir.1982), or delaying the processing of an application to the potential beneficiary's detriment, I.N.S. v. *Miranda*, ___ U.S. ___, 103 S.Ct. 281, 74 L.Ed.2d 12 (1983) (per curiam).



or obtained the benefits.[28] Clearly, the Florida farmers have available no such remedial option; the court must reopen the application period for availability of benefits. Perhaps the most important difference in *Hansen*, however, is the potential ramifications on the public fisc. If a person could obtain retroactive Social Security benefits by claiming to have visited the office and been told of ineligibility, the expenditure of funds on proof of claimants eligibility and employee behavior could be astounding. The district court's remedy in the present case does not threaten the public fisc. Loans, which presumably are repaid, are involved. A revolving fund exists for such loans. The remedy merely provides for a reopening of the application period; farmers must still demonstrate eligibility for relief. We must presume that the agency in the future will give sufficient notice to the public of the availability of emergency loans and that this factual situation will not recur.[29]

Having thus found the agency responsible for violating its own procedure as prescribed by law, relying on *Ruiz*, 415 U.S. at 235, 94 S.Ct at 1074, *Accardi*, 347 U.S. at 268, 74 S.Ct at 503, and *Heffner*, 420 F.2d at

[28] Ms. Hansen did, in fact, file an application some 10 or 11 months later after which time she received the requested benefits.

[29] We do not decide the remedy issue in this case on a theory of agent misrepresentation as to the nonavailability of emergency loans to farmers. The reopening of the application period is mandated by the failure to follow affirmatively required procedure. *See generally United States* v. *Heffner*, 420 F.2d 809 (4th Cir.1970). However, although the district court made no finding of affirmative misbehavior or willful failure to notify, we note the prevalence of such neglect at every level as well as the recurrence of the lack of notice.

811-12, and having held this not to be a case of negligence as in *Hansen, Augusta Aviation*, 671 F.2d at 449, and *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380, 68 S.Ct. 1, 92 L.Ed. 10 (1947), we turn to the government's final contention.

*Sufficiency of Notice*

Applicants claim that notwithstanding their other contention, the district court committed reversible error in concluding that the notice transmitted by FmHA regarding its emergency loan program was legally insufficient. The government argues that notice was provided in the Federal Register, the appropriateness of the notice is committed to agency discretion and hence not judicially reviewable, and FmHA otherwise complied with the applicable regulations. Appellees assert that FmHA failed to comply with specific notice requirements imposed by regulation, the public announcements were inappropriate as a matter of law, and the notice was insufficient under the due process clause of the fifth amendment.

At the time of publication of the disaster declaration,[30] the applicable regulations specifically instructed FmHA officials to notify the state and appropriate county USDA Defense Board Chairmen and other agricultural lenders in the area. 7 C.F.R. sec. 1832.3(a)(1) (1973). The regulations also provided for other "such public announcements as appear appropriate." *Id.* Pursuant to the passage of Public Law No. 93-237, the Federal Register carried notification of the extended application period and an instruction to FmHA officials

[30] The disaster declaration was published on June 5, 1973. 38 Fed.Reg. 14800 (1973).



to "inform the news media including neswpapers, radio, and television in the affected counties of the provisions of P.L. 93-237."[31]

The district court specifically found that "Defendants did not comply with regulations requiring the giving of notice to State and County USDA Defense Boards and agricultural leaders in the community." Record Vol. 3 at 104. Several exhibits indicate that FmHA requested a meeting of Defense Board personnel to acquaint them with the availability of USDA assistance to disaster victims. Plaintiffs' Exhibits 12-15; Defendants' Exhibit 5. Such a request and subsequent meeting probably suffices to meet the directive that the State Director notify the USDA Defense Board chairman. *See* 7 C.F.R. sec. 1832.3(a). Evidence exists, however, indicating that the notice given at this meeting stated only that applications should be filed by the July 30, 1973 deadline. A telegram clarifying the February 26, 1974 deadline for production losses was not received by the State Director until July 9, 1973—some time after the meeting. Plaintiffs' Exhibit 17. As to the county supervisor's duty to notify the appropriate county USDA Defense Board Chairman, several county supervisors testified that they normally maintained contact with the USDA Defense Board and conversed regarding the emergency loan program information. Record Vol. 5 at 173-74; Vol. 9 at 935-37, 967. Several county supervisors also

[31] The notice provided that it was "being published without notice of proposed rulemaking, effective immediately, since it implements the provisions of Public Law 93-237, and because a delay in implementing the provisions of the public law by this regulation would be contrary to the public interest." 39 Fed. Reg. 7569 (1974).

testified that they informed agricultural lenders in the area of the emergency loan program. Record Vol. 6 at 306; Vol. 9 at 936. The Chairman of the Board of Directors of the local Federal Land Bank testified, however, that he was unaware of the FmHA emergency loan program and had he been aware would have applied for a loan for his disaster related losses. Record Vol. 8 at 586-609. Area farmers also testified that they borrowed money on less favorable terms from other lenders during this time period. Record Vol. 5 at 208, 231-32; Vol. 7 at 480-81, 504-05.

While agreeing that community agricultural lenders were without sufficient notice, this intra-agency/business notice pertains only peripherally to the issue on which we affirm the district court's finding of inadequate notice.[32] FmHA failed to comply with federal regulations specifically designed to transmit notice of available emergency loan programs to the *public*. FmHA made no loans during the initial application period and only a handful during the renewed period. The press releases mandated during the reopened loan pe-

[32] A similar, tangential notice issue involves the regulations which became effective July 30, 1973 and required county supervisors to notify immediately the governing body of the county. 38 Fed.Reg. 20244 (1973). The applicability of this regulation is contested, the government contending relevance only to future emergency loan programs. Record Vol. 5 at 88. A letter from the Assistant Administrator of Farmer Programs to the State Director, however, directed the state official to hold in abeyance "the report to the county government contact . . . until the final publishing [of new instructions] in the Federal Register of July 16, 1973." Plaintiffs' Exhibit 16; *see also* Record Vol. 5 at 85-93. After reviewing the evidence on this issue, we find that notice to the county commissions was generally lacking. *See* Record Vol. 6 at 307; Vol. 7 at 448-49, 478-79.



riod, *see* 39 Fed.Reg. 7570 (1974), consisted of one state-issued sample press release forwarded to local newspapers by county officials. Aside from receiving little publication, the sample press release merely stated that "loan applications will be taken under the terms of a new law (P.L. 93-237) enacted January 2, 1974." Plaintiffs' Exhibit 21. It said nothing of the availability of a reduced interest rate, the possibility of a partial cancellation of loan principle, or the elimination of the "credit available elsewhere" requirement. The notice failed to "inform the news media . . . of the *provisions* of P.L. 93-237." 39 Fed.Reg. 7570 (1974) (emphasis supplied).

In light of FmHA's failure to comply with specific prescriptions for notice, we find it unnecessary to determine whether FmHA provided "such public announcements as appear appropriate" or whether in fact such a requirement is judicially reviewable.[33] We do note, however, the paucity of public announcement during both the initial and reopened application periods. Especially is this continual dearth of public notice noteworthy where the state director testified that his staff and he were "flabbergasted" at the lack of response to the emergency loan program. Record Vol. 8 at 658.

In contrast to the procedure invoked by FmHA for disseminating notice of emergency loan availability, the Small Business Administration (SBA) and Agricultural Statibilization and Conservation Service (ASCS) transmitted numerous detailed notices to the potential bene-

[33] While discretionary acts are not reviewable, acts tantamount to a refusal to exercise discretion are subject to judicial review. *E.g., United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954).

ficiaries of their respective programs. SBA authorized at least three extensive notices listing its program's specific terms which were sent to the available area media offices, including the Jacksonville UPI and AP offices, four television stations, and numerous newspapers and radio stations. Record Vol. 10 at 1060-65. ASCS used its ongoing system of monthly newsletters to inform farmers of its emergency program and would have allowed other agencies to use this source of notice if asked. Record Vol. 7 at 540-52; Vol. 9 at 882-85. Moreover, some testimony revealed the possible existence of a "sign-up" sheet emanating from the week-long disaster meeting coordinated by OEP which could have been utilized by FmHA in contacting interested area farmers.[34] Record Vol. 9 at 1023; Vol. 10 at 1077-78.

Our review of the record convinces us that the district court was not clearly erroneous in its six pages of findings of fact and that it was correct in its ultimate conclusion of insufficient notice. *See Marable* v.

[34] In the state of Washington during the first loan period, state and county FmHA directors issued news releases to the Associated Press, United Press International, and local newspapers. A county director also made a personal television appearance on a show broadcast to the entire disaster area. Eleven loans were granted. During the second loan period, Washington state and county FmHA officials notified the prior eleven borrowers and sent out "several" news releases. The officials also contacted unsuccessful applicants from the first loan period. One county supervisor mailed out fact sheets to all active borrowers in his office file. FmHA granted 161 additional loans. The district court found the notice inadequate but entered judgment for the government on other grounds. The court of appeals affirmed. *Emergency Disaster Loan Ass'n, Inc.* v. *Block*, 653 F.2d 1267 (9th Cir.1981).



*H. Walker & Associates*, 644 F.2d 390, 395 (5th Cir. Unit B 1981).[35]

*Motion to Intervene*

James H. Collins, Jr., a Georgia farmer, sought to intervene in this suit individually and on behalf of all others similarly situated.[36] The class Collins seeks to represent is one of all farmers in the 27 states and Puerto Rico who live in areas declared disaster areas during the same time period as the initial suit,[37] who suffered losses as a result of the natural disaster which was the subject of said designations, and who were eligible to apply for emergency disaster loans but were not notified of their eligibility to apply.[38] The district

[35] Plaintiffs also maintain that the emergency loan program constitutes a statutory entitlement and thus a species of property entitled to fifth amendment protection. FmHA expectedly argues no deprivation of property and, alternatively, that sufficient notice was given. Since nonconstitutional issues dispose of the case in favor of plaintiffs, we decline to rule upon the constitutional issue raised by plaintiffs. We note also our rejection of appellants' argument that because notice was provided in the Federal Register, the public was on constructive notice of the loan program. In the absence of specific regulations requiring specific types of notice, as well as the specific notice provision encompassed in the Federal Register and later codified in the Code of Regulations, this argument might prevail. However, in the posture of the regulations controlling this case, it appears spurious at best.

[36] In his brief in support of motion to intervene, Collins asserts that he is entitled to intervene as a matter of right and that he qualifies for permissive intervention. Record Vol. 4 at 130. On appeal, he appears to assert only intervention of right. Brief for the Intervenors at 26-34. *See* Fed.R.Civ.P. 24.

[37] The time period involved is December 27, 1972 through April 19, 1973, inclusive.

[38] Collins' complaint alleges that only one loan was granted by FmHA in Georgia during the relevant time period notwith-

court denied Collins' motion to intervene as an individual and class plaintiff, finding the motion untimely since the case had already "proceeded to final judgment and [was then] on appeal."[39] Record Vol. 4 at 131. Collins appeals to this court.[40]

The timeliness of a motion to intervene is a question largely committed to the district court's discretion. *Howse* v. *S/V "Canada Goose I"*, 641 F.2d 317 (5th Cir. Unit B 1981). The standard of review is abuse of discretion. *Stallworth* v. *Monsanto Co.*, 558 F.2d 257 (5th Cir.1977). As in the instant case, courts often are reluctant to grant leave to intervene post-judgment. "Interventions after judgment have a strong tendency to prejudice existing parties to the litigation or to interfere substantially with the orderly process of the court." *United States* v. *United States Steel Corp.*, 548 F.2d 1232 (5th Cir.1977).

After careful consideration of the arguments in support of intervention, we find no abuse of discretion in the trial court's denial of leave to intervene. The appeal decided today results from a case involving extensive discovery and lengthy litigation. The testimony relates almost solely to action or inaction by state and county officials in Florida. To allow the requested intervention

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standing the designation of two disaster areas spanning 24 counties. Record Vol. 4 at 129.

[39] Actually, an appeal had not yet been filed, but a motion to stay the judgment pending appeal had. (The final judgment was entered March 5, 1981. The motion to intervene was filed April 14, 1981 and denied April 15, 1981. The Secretary of Agriculture filed a notice of appeal April 17, 1981.)

[40] *See Stallworth* v. *Monsanto Co.*, 558 F.2d 257, 263 (5th Cir.1977) ("[W]e are authorized to decide whether the petition[ ] for leave to intervene [was] properly denied.")



would require exhaustive discovery to determine what information was disseminated in 27 states and Puerto Rico.[41] Since our finding of insufficient notice is limited to one specific disaster declaration, the proposed intervention would inject into this case numerous issues not heretofore considered. Collins' admonition that we enter a Rule 54 judgment in favor of the existing plaintiffs and declare plaintiffs-intervenors a subclass is not well-taken. We note, however, that these would-be intervenors are not necessarily precluded by today's ruling from filing an independent action.[42] For the foregoing reasons and because a district court's proper denial of intervention is not a final judgment, *United States* v. *United States Steel Corp.*, 548 F.2d 1232 (5th Cir.1977), we dismiss plaintiffs-intervenors' appeal for want of jurisdiction.

Accordingly, the district court order is

AFFIRMED.

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[41] The fact-finding would require ascertainment not only of what specific notice was disseminated but also what type of notice was required for disaster declarations other than Presidential designations. For example, the disaster declaration in Georgia was a Secretarial designation.

[42] Appellant maintains and Collins does not refute that Collins filed an independent action in the Southern District of Georgia in May 1981. (On November 9, 1981, *Collins* v. *Block*, No. CV 281-63, was dismissed without prejudice for statistical purposes to be restored if circumstances warrant—stayed pending decision in another case.)

APPENDIX C

UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT.

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No. 81-5365

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RONALD E. PAYNE, INDIVIDUALLY
AND ON BEHALF OF HIMSELF AND OTHERS
SIMILARLY SITUATED, PLAINTIFFS-APPELLEES,

*v.*

JOHN R. BLOCK, INDIVIDUALLY AND AS
SECRETARY OF THE UNITED STATES
DEPARTMENT OF AGRICULTURE,
ET AL., DEFENDANT-APPELLANTS,

*v.*

JAMES J. COLLINS, MOVANT-
APPELLANT-INTERVENOR.

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Appeals from the United States District
Court for the Middle District of Florida.

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DEC. 19, 1983.

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**ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC**

Before GODBOLD, Chief Judge, HENDERSON, and CLARK, Circuit Judges.

PER CURIAM:

The petition for rehearing is considered as will be hereinafter set forth. With respect to the suggestion for rehearing en banc, no member of this panel nor judge in regular active service on the court having requested that the court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit



Rule 26), the Suggestion for Rehearing En Banc is DENIED.

In its petition for rehearing, the government contends that in our opinion in this case, 714 F.2d 1510 (11th Cir.1983), the court erred in construing a "staff instruction" as an agency "regulation" because the "instruction" was published in 39 Fed.Reg. 7569 (1974). The government urges that grave consequences may flow from our interpretation of its "instruction" as a "regulation." With admirable candor, the government points out in its petition that its arguments before the panel did not address the proper categorization of the publication in question. Government's Brief at 13.

"Agency action" contemplates a vast range of administrative functions, *see Batterton* v. *Marshall*, 648 F.2d 694, 702-03 (D.C.Cir.1980), and we recognize that proper classification of such action is often essential. *See, e.g.*, 5 U.S.C. § 553(b)(3)(A) (no requirement of advance publication and opportunity for public participation for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice"). The panel's conclusion, however, was not based upon any rigid label attached to the material published on February 27, 1974 in the Federal Register. We stated that government agencies have to follow the law and their regulations but, relying upon *Morton* v. *Ruiz*, 415 U.S. 199, 94 S.Ct. 1055, 39 L.Ed.2d 270 (1974), *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260, 74 S.Ct. 499, 94 L.Ed. 681 (1954), and *United States* v. *Heffner*, 420 F.2d 809 (4th Cir. 1970), held that where the rights of individuals are affected, agencies may not depart from established procedures. Furthermore, whether those procedures are published

or not is not determinative. *See Gulf States Mfgrs.* v. *NLRB*, 579 F.2d 1298, 1308-09 (5th Cir.1978). Suffice it to say that while any language categorizing the publication as a regulation may have been overbroad, the government's label of "staff instruction" does not persuade us that the agency action in question is governed by *Schweiker* v. *Hansen*, 450 U.S. 785, 101 S.Ct. 1468, 67 L.Ed.2d 685 (1981). The publication in the instant case is not a "simple administrative directive to agency employees," *Kirkland Masonry, Inc.* v. *Commissioner*, 614 F.2d 532, 534 (5th Cir.1980), and is more like the action involved in *Morton* and *Gulf States*, *supra*. *Cf.* K. Davis, *Administrative Law*, § 7:4, p. 167 (1982 Supp.) (legal effect of a Treasury Department Handbook, which was not a regulation, should be determined in accordance "with the elementary idea that the government should behave responsibly"). "[L]egal characterization [of agency action] cannot be accomplished merely ... by semantic play," *Batterton*, *supra*, 648 F.2d at 703, and the government's argument is nothing more than that. Thus, our opinion about the case is unchanged.

To hold otherwise would go to the very core of our democratic government and permit agencies to ignore congressional actions and internal administrative procedures, and, in a case such as this, make loans to "favored friends of the agency," members of the political party in power," or by some other autocratic method distribute government benefits. Since that is not our system, we cannot approve agency actions contrary to congressional or administrative mandates which frustrate benefit programs statutorily authorized and



funded by Congress. We do not suggest that in this instance the agency had any improper motives.

The panel opinion is adhered to as modified herein.

APPENDIX D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Case No. 76-605-Civ-J-WC

RONALD E. PAYNE, INDIVIDUALLY AND ON BEHALF OF HIMSELF AND OTHERS SIMILARLY SITUATED,
PLAINTIFF

*v.*

EARL L. BUTZ, INDIVIDUALLY AND AS SECRETARY OF THE UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL., DEFENDANTS.

[Filed Feb. 11, 1981]

**ORDER AND OPINION**

This is a class action suit brought by farmers against the Farmers Home Administration (FHA), United States Department of Agriculture, claiming inadequate notice of an emergency loan program available in 1973 and 1974. The Court has jurisdiction pursuant to 28 U.S.C. § 1331.

Plaintiffs contend that the notice of benefits under the federal loan program administered by the FHA was inadequate on two grounds; first, that the FHA failed to follow its own regulations regarding notice and second, that even if the regulations had been followed, the notice would have been constitutionally infirm.

Defendant FHA contends that its agents were in substantial compliance with the applicable regulations, that the notice was not constitutionally infirm and that the



FHA loan program does not rise to the level of the protected due process right.

The factual background of this case is substantially uncontroverted, and reveals that:

From April 10, 1973 through April 19, 1973 in thirteen north Florida counties there was a series of heavy rains. The counties involved were Baker, Columbia, Dixie, Gilchrist, Hamilton, Jefferson, Lafayette, Leon, Levy, Madison, Nassau, Suwannee and Wakulla. As a result of this rain some flooding, crop damage and property damage occurred.

On May 26, 1973, the President, acting pursuant to 7 U.S.C. § 1961, declared the thirteen north Florida counties a disaster area.

As part of available federal assistance to the disaster area, the FHA was authorized and funded to make emergency loans in this thirteen county area.

The initial terms of the emergency loan included 5% interest. The application period for production losses was nine months and ended on February 26, 1974. The application period for physical damage to land ended on July 30, 1973.

The FHA was required to give notice during this initial loan period in accordance with 7 C.F.R. 1832(a)(1) (1972) and FHA Instructions to County Supervisors 441.2111(A)(2). The cited section of the Code of Federal Regulations provides:

> (a) [T]he State Director [of the FHA] will notify the appropriate County Supervisors immediately and instruct them to make EM loans available under § 1832.13. His notification will be confirmed by State requirements issued as soon as possible. The State Director will also notify the USDA Defense

Board Chairman and will make such public announcements as appear appropriate.

(1) Immediately upon receiving notice about the counties under his jurisdiction, the County Supervisor will notify the appropriate County USDA Defense Board Chairman and make such public announcements as appear appropriate about the availability of EM loans under § 1832.13. Also, the County Supervisor will explain to other agricultural lenders in the area the assistance available under this program.

The FHA processed no applications for and made no emergency loans in this thirteen county area during the 1973 loan period.

On January 2, 1974, the President of the United States signed P.L. 93-237, 87 Stat. 1023, which extended the application period to April 4, 1974, significantly changed the terms of available loans to provide that emergency loans would be at 1% interest with the first $5000.00 forgiven and eased some of the eligibility requirements.

The FHA regulations pertaining to emergency loans under the special authorization of P.L. 93-237 were not published in the Federal Register until February 27, 1974, 39 Fed. Reg. 7569, and provided that the County Supervisor was to prepare a list of paid up and indebted borrowers who had received emergency loans, notify each person on the list of the new terms and determine if that person was eligible for any benefit under the new terms of the loan. The regulation does not otherwise refer to notice.

The FHA made either three or four loans under the 1974 regulations. (hereafter referred to as the second loan period).



The crucial issue in this litigation is whether the notice given by the FHA complied with its own regulations. One of the key considerations in this regard is the requirement that the State Director and County Supervisors of FHA "make such public announcements as appear appropriate" concerning the emergency loans. The testimony presented by the parties showed and the Court finds as fact that:

1) After the rains leading to the disaster declaration, damage estimates were compiled by the FHA, which although later revised downward, showed, together with the testimony of several witnesses, that many of the farmers in the thirteen county area sustained some form of loss or damage from the heavy rains and flooding; that most of the farmers were aware of the purpose and function of the FHA to provide funds for relief of farmers but there were no applications processed for FHA emergency loans and no loans were granted during the first loan period.

2) A disaster relief type meeting was held in Live Oak, Florida in early June, 1973 and lasted about one week. At this meeting, which was well attended by local farmers, various government agencies set up tables at which an agency representative was stationed for the purpose of supplying information and assistance to people about the disaster relief programs available through these agencies. The FHA had such a table but it was manned by an FHA representative for only short periods of time. The majority of the time it was manned by a volunteer, not from the FHA, and who was without knowledge of or familiarity with FHA programs generally or this emergency program specifically. There was testimony that some farmers were told at the Live Oak

meeting that there was no emergency help available for farmers who had sustained crop losses but only for those who had sustained damage to their houses. This was in fact not true and FHA officials were aware of the widespread belief by farmers in this erroneous information. There was no evidence that FHA specifically undertook any planned course of action to correct this erroneous impression at the Live Oak meeting.

3) With regard to the FHA's obligation to make "such public announcements as appear appropriate" concerning the availability of emergency funds and the responsibility of the FHA to comply with the functions outlined in the job description of the County Supervisors to:

> Maintain(s) cooperative working relationships with representatives of other Federal, State, and local agencies, banks, commercial institutions, rural community leaders, etc. Represent(s) the FHA in keeping the public currently informed through the use of informational media and by maintaining close contacts with farmers, civic and other appropriate organizations and rural association groups. Consult(s) with State Office staff specialists and committeemen, as appropriate.

(Plaintiffs' Exhibit 38, FHA Instructions to County Supervisors), it appears that the local FHA offices were understaffed, underinformed, overworked and simply had limited time and resources to pursue this specific emergency program and still keep abreast of their ongoing duties, as an unfortunate result of which:

a) On June 4, 1973, the State Director of the FHA, Claude Green, issued a memorandum directing his County Supervisors to issue press releases. (Plaintiffs' Exhibit 9). No evidence is before this Court that would



support a finding that Green made any other "public" announcements. Green stated that because he was "flabergasted" at the fact that there had been no loan applicants during the first loan period, he advised one of his staff to check to see if the news media was in fact notified. Green did not indicate the results of such a check, but noted that on numerous occasions, the FHA sent out press releases and the media did not publish them. (Plaintiffs' Exhibit 29, Deposition of Claude Green).

b) The sample press release issued by Green to the County Supervisors in 1973 (Plaintiffs' Exhibit 9), contained the statement that "Loan applicants should apply prior to July 30, 1973" but omitted any reference to the February 26, 1974 deadline to apply for production losses.

c) Although the County Supervisors in the thirteen county area testified that their office routinely sent all press releases to the media on a list they kept for that purpose, they made no follow up effort to determine if any press release was actually published.

d) Although several newspapers carried information concerning the FHA program, the Monticello News appears to have been the only one that carried the press release in full. (Defendants' Exhibit 13, dated June 21, 1973), but this of course did not contain any information concerning the January, 1974 changes in the emergency loan terms. Two other newspapers covering the disaster stated that FHA would make loans at 5% if no other credit were available and stated that the local FHA office should be contacted. (Defendants' Exhibits 17 and 19). Only one newspaper contained the correct date for FHA loans due to crop loss. (Defendants' Exhibit 12D).

e) The State Director issued a memorandum and sample press release on February 28, 1974, to all County Supervisors. (Plaintiffs' Exhibit 21). The sample press release stated that loan applications would be taken under the terms of the new law (P.L. 93-237) and that "individual examination would be made of each applicant to determine the date of disaster occurrence and type of emergency loan benefits available." However, the press release did not recite the critically important new terms of the $5000.00 forgiveness or 1% interest, nor did it recite the change in the requirement that no other credit be available.

f) Although the memorandum from the State Director (Plaintiffs' Exhibit 21) also enclosed a letter to be sent to any prior recipients of emergency loans, this letter was not sent to anyone in the thirteen county area because there had been no prior emergency loans. The letter was not forwarded to anyone who had expressed interest in such loans because records were not kept of such people. No other effort was made to contact any farmer who had inquired about or who may have needed an emergency loan.

g) Although another federal agency, the Agriculture Soil Conservation Service (ASCS) apparently had an efficient ongoing system of maintaining continuous contact by monthly mailings of bulletins, newsletters and other information to farmers and residents of the involved areas, and ASCS would have willingly included information of the FHA emergency program had it been requested to do so, neither the State or County FHA offices ever made any inquiry of ASCS about such procedure.



h) There were no signs or pamphlets at FHA offices regarding emergency loans for this disaster.

i) Lack of notice problems were compounded by lack of knowledge of the correct information by FHA officials. Mr. Taylor, County Supervisor for Hamilton, Madison and Taylor counties, was unaware of the correct eligibility requirements during the first loan period, did not know when the period expired and was unaware of an extended second application period until a would be borrower brought it to his attention in February of 1974.

j) FHA officials made routine operating loans to farmers who had been affected by the disaster without ever mentioning or exploring the possibilities of their eligibility for emergency loans. Originially, when the emergency loan's terms were comparable to those of the operating loans, this may not have been significant. However, when the FHA emergency loan program changed its terms to 1% interest and $5000.00 forgiveness, with more favorable eligibility requirements, these farmers were deprived of the benefits envisioned by P.L. 93-237.

k) The extension of the loan application period to April 2, 1974 was signed by the President on January 2, 1974. The FHA county Supervisors were not notified of the extension until February 28, 1974, after two thirds of the ninety day period had already passed.

l) In many instances, County Supervisors actually visited farms which had sustained visible damage to the crops and land, discussed with the involved farmers other FHA programs which might be utilized by such farmers and made no mention of the existence of these

emergency loans and the attractive beneficial terms on which they were available.

4) Had FHA officials notified State and County USDA Defense Boards as well as other agricultural lenders of the availability of the FHA emergency loan program as is required by 7 C.F.R. § 1832(a)(1) (1972), the probability of this information becoming more widely disseminated would have substantially increased. However, no County Supervisor testified that he in fact gave such notice. All testified that they were aware of their responsibility to do so and therefore assumed that they did so. This testimony must be evaluated, however, in the light of direct testimony from the Chairman of the Board of Directors of the Federal Land Bank to the effect that even he was unaware of this FHA emergency loan program, that had he been aware of it he would have applied for a loan because of his disaster related losses, and also in the light of the direct testimony of farmers who borrowed needed funds from other agricultural lenders in the area and who were not informed by such lenders of the FHA emergency loan program. The Court therefore concludes that the Defendants did not comply with the regulations requiring the giving of notice to State and County USDA Defense Boards and agricultural lenders in the community.

Based upon the foregoing facts, the Court makes the following conclusions of law:

1) Such notice of the emergency loan program as may have been given by the FHA during the 1973-1974 emergency loan period was not sufficient to comport with the applicable regulations, 7 C.F.R. § 1832.3(a)(1) (1972). The regulations provide for specific types of notice which were not effectuated. The State Director and



County Supervisors were to "make such public announcements as appear appropriate." While this affords a degree of latitude to the FHA officials, given the circumstances of this case, such as the demonstrated need for emergency assistance, the prevelant [sic] misinformation, the lack of accurate information on the part of FHA's own officials and the major changes in terms and eligibility requirements about which inadequate notice was given, the public announcements by the FHA were not "appropriate" as a matter of law. An agency's failure to follow its own regulations is presumed to be prejudicial. *United States Steel Corp. v. United States Environmental Protection Agency*, 595 F.2d 207 (5th Cir. 1979).

2) The constitutional issues raised by the Plaintiffs need not be and therefore are not considered because nonconstitutional issues are dispositive of the case. *NAACP v. Alabama*, 357 U.S. 449 (1958); *Communist Party of the United States. v. Subversive Activities Control Board*, 351 U.S. 115 (1956); *Hurd v. Hodge*, 334 U.S. 24 (1948).

3) This Court is authorized to require a reopening of the FHA 1973-1974 emergency loan program. Such action is not in the nature of mandamus, but is a mandatory injunction.

4) The issue of the eligibility for FHA emergency loan benefits is not reached. It is within the province of the FHA to process all applications and apply the eligibility requirements of 7 C.F.R. § 1832 (February 27, 1974).

5) The Plaintiffs are not entitled to attorneys fees for the reasons enunciated in *Pealo v. Farmers Home Ad-*

*ministration*, 562 F.2d 774 (D.C. Cir. 1977). The Plaintiffs, as prevailing party, are entitled to their costs in accordance with 28 U.S.C. § 2412.

6) The class as certified by the Court's Order of 1978 has been reconsidered. The evidence and testimony at trial show that the class as previously certified is unduly restrictive in excluding from its scope those farmers who sustained loss or damage as a result of the 1973 disaster designated as M-345 other than from "flooding." It is clear that the basis for the disaster declaration was not restricted to flooding but was "as a result of severe storms and flooding, beginning on April 1, which caused serious and widespread damage to public and private property." (Plaintiffs' Exhibit 48, Presidential Documents). The class is therefore recertified as being.

> All farmers in the thirteen county area covered by the Disaster Declaration M-345 who:
>
> 1) suffered damage from floods or severe storms in the major natural disaster declared by the President on May 23, 1973; and who
>
> 2) were eligible to apply for emergency disaster loans administered by the Farmers Home Administration pursuant to 7 C.F.R. § 1832 (1974), and
>
> 3) who were not notified that they were eligible to apply for emergency loans.

It is therefore

ORDERED:

1. Judgment is entered for the Plaintiffs, Ronald E. Payne, et. al., and the recertified class, and against the Defendants, Secretary of Agriculture, et. al.

2. The Farmers Home Administration shall reopen the 1973-1974 emergency loan program in the thirteen



north Florida counties declared a disaster by the President on May 26, 1973. The terms and benefits applicable to this reopened program shall be those published in 7 C.F.R. § 1832 (February 1974). The application period for the reopened loan period shall be from April 15, 1981 until June 15, 1981. The Farmers Home Administration shall have from the date of this Order to April 15, 1981 within which to give notice in compliance with 7 C.F.R. § 1832.3(a)(1)(1972).

3. The Plaintiffs are awarded costs of this litigation.

DONE AND ORDERED at Jacksonville, Florida this 11th day of February, 1981.

/s/ WILLIAM J. CASTAGNA

UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

No. 76-605
Civ-J-W6

RONALD E. PAYNE AND CARBIE ELLIE, PLAINTIFFS
*v.*
JOHN R. BLOCK, SECRETARY OF AGRICULTURE, ET AL., DEFENDANTS.

[FILED JUNE 7, 1982]

**AMENDED FINAL JUDGMENT**

For the reasons set forth in the Opinion entered on February 11, 1981, and the Order entered on that date, it is

ADJUDGED:

1. Judgment is entered for the Plaintiffs, RONALD E. PAYNE, and CARBIE ELLIE, Individually and as representatives of the recertified class, and against the Defendants, Secretary of Agriculture, et al. The recertified class is defined as:

> All farmers in the thirteen county area covered by the Disaster Declaration M-344 [sic] who:
>
> 1) suffered damage from floods or severe storms in the major natural disaster declared by the President on May 26, 1973; and who
>
> 2) were eligible to apply for emergency disaster loans administered by the Farmers Home Administration, pursuant to 7 C.F.R. § 1832 (1974); and



> 3) who were not notified that they were eligible to apply for emergency loans.

2. The Farmers Home Administration shall reopen the 1973-1974 emergency loan program in the thirteen north Florida counties declared a disaster by the President on May 26, 1973. The terms and benefits applicable to this reopened program shall be those published in 7 C.F.R. § 1832 (February, 1974). The application period for the reopened loan period shall be from April 15, 1981, until August 15, 1981. The Farmers Home Administration shall have from the date of this Judgment to June 1, 1981, within which to give notice in compliance with 7 C.F.R. § 1832.3(a)(1) (1972).

3. The Plaintiffs are awarded costs of this litigation.

4. Ruling on the issue of Plaintiffs' attorneys' fees is deferred.

5. The Plaintiffs and Defendants shall submit a plan for notification of class members for the Court's approval by March 18, 1981.

6. The Court reserves jurisdiction to enter such other and further Orders as may be appropriate.

7. This Amended Final Judgment amends the Final Judgment entered by the Court on March 5, 1981.

DONE and ORDERED at Tampa, Florida, this 1st day of June, 1982, *nuc pro tunc*.

/s/ WILLIAM J. CASTAGNA
UNITED STATES DISTRICT JUDGE

**APPENDIX F**

U.S. Department of Agriculture
Farmers Home Administration

FHA Instruction 441.5

Modifies and Supplements
FHA Ins. 441.2 and 441.4

## SPECIAL EMERGENCY LOAN POLICIES AND AUTHORIZATIONS IMPLEMENTING APPLICABLE PROVISIONS OF PUBLIC LAW 93-237.

I *GENERAL:* This Instruction supplements and modifies FHA Instruction 441.2, including Supplements, and FHA Instruction 441.4, provides for making and processing Emergency (EM) loans; and provides for processing additional benefits for certain indebted and paid-up EM loan borrowers under the provisions of Public Law 93-237 signed by the President on January 2, 1974. EM loans may be approved and retroactive benefits processed as follows:

The basic objective of EM loans is to indemnify eligible farmers, ranchers, and oyster planters for losses resulting from designated disasters in order that they may continue their future farming or livestock operations with credit from other sources (including Farmers Home Administration (FHA) Operating (OL) and Farm Ownership (FO) loans). In accordance with this objective, EM loans will be limited to the actual loss sustained, except for subsequent EM loans authorized by paragraph X B.



II *RECEIVING APPLICATIONS AND VERIFYING LOSSES:*

A. State Directors will be advised by telegram of counties where EM loans are authorized under paragraphs III and V. In all counties designated on or before January 2, 1974, based on disasters occurring after December 26, 1972, the termination date for acceptance of applications based on both physical and production losses will be *April 2, 1974*, except where termination dates previously established would be shortened. Where this situation will occur, the termination date that was previously set beyond April 2, 1974, will be used. Termination dates for any new counties that might be designated after January 2, 1974, will follow the current policy (60 days for physical losses and 9 months for production losses). State Directors will issue an instruction setting forth this information for use in their respective states. State Directors and County Supervisors will inform the news media including newspapers, radio, and television in the affected counties of the provisions of P.L. 93-237. A suggested news release for local use is attached as Exhibit C.

* * * * *

FHA Instruction 441.5
Exhibit C

*SAMPLE PRESS RELEASE*

UNITED STATES DEPARTMENT OF AGRICULTURE
Farmers Home Administration

Town _____, State

For Further information
call _____
Telephone: _____

EMERGENCY LOANS AVAILABLE FROM FARMERS HOME:

Farmers (and ranchers) in (name) county, (state name) , who sustained production or physical losses as a result of the (type of disaster—drought, flood, hail, etc.) which struck during (indicate the period involved) may be eligible to receive an emergency loan from the Farmers Home Administration.

Those who have not received an emergency loan to assist them in recovering from their loss may apply for such a loan at the Farmers Home Administration county office at (street address) , (name of town) , before close of business (insert termination date supplied by State Director.)



These loan applications will be taken under the terms of a new law (P.L. 93-237) enacted January 2, 1974. Individual examination will be made of each application to determine date of the disaster occurrence and type of emergency loan benefits for which the applicant is eligible.

Farm emergency loans may include funds to repair or restore damaged farm property as well as reimburse applicants for expenses already incurred for such purposes. Loans based on qualifying production losses may include funds to reimburse applicants for production expenses which went into damaged or destroyed crop and livestock enterprises, but not to produce new crops during 1974. Payment terms depend on the purposes for which the loan is used and the applicant's payment ability. No loan may exceed the actual loss sustained.

(2-15-74) SPECIAL PN 2-15-74

APPENDIX G

39 Fed. Reg. 7569-70 (Feb. 1974)

Title 7—Agriculture

CHAPTER XVIII—
FARMERS HOME ADMINISTRATION,
DEPARTMENT OF AGRICULTURE

SUBCHAPTER C—LOANS PRIMARILY FOR PRODUCTION PURPOSES

[FHA Instruction 441.5]

PART 1832—EMERGENCY LOANS

Subpart E—Special Emergency Loan Policies and Authorizations Implementing Applicable Provisions of Public Law 93-237

Subchapter C, Loans Primarily for Production Purposes, of 7 CFR Chapter XVIII, is amended by adding to Part 1832 a new Subpart E, Special Emergency Loan Policies and Authorizations Implementing Applicable Provisions of Public Law 93-237. New subpart E supplements and modifies Subparts A and B of this part; provides for making and processing Emergency (EM) loans; and provides for processing additional benefits for certain indebted and paid-up EM loan borrowers under the provisions of Public Law 93-237 signed by the President on January 2, 1974.

In accordance with 5 U.S.C. 553, this new subpart is being published without notice of proposed rulemaking, effective immediately, since it implements the provisions of Public Law 93-237, and because a delay in implementing the provisions of the public law by this regulation would be contrary to the public interest.



The new subpart E reads as follows:

Subpart E—Special Emergency Loan Policies and Authorizations Implementing Applicable Provisions of Public Law 93-237

Sec.



AUTHORITY: 7 U.S.C. 1989; 42 U.S.C. 1480; delegation of authority by the Sec. of Agri., 38 FR 14944, 14948, 7 CFR 2.23; delegation of authority by the Asst. Sec. for Rural Development, 38 FR 14944, 14952, 7 CFR 2.70.

§ 1832.81 General.

The basic objective of EM loans is to indemnify eligible farmers, ranchers, and oyster planters for losses resulting from designated disasters in order that they may continue their future farming or livestock operations with credit from other sources (including FHA

Operating and Farm Ownership loans). In accordance with this objective, EM loans will be limited to the actual loss sustained, except for subsequent EM loans authorized by § 1832.90(b).).

§ 1832.82 Receiving applications and verifying losses.

(a) State Directors will be advised by telegram of counties where EM loans are authorized under §§ 1832.83 and 1832.85. In all counties designated on or before January 23, 1974, based on disasters occurring after December 26, 1972, the termination date for acceptance of applications based on both physical and production losses will be April 2, 1974, except where termination dates previously established would be shortened. Where this situation will occur, the termination date that was previosuly set beyond April 2, 1974, will be used. Termination dates for any new counties that might be designated after January 2, 1974, will follow the current policy (60 days for physical losses and 9 months for production losses). State Directors will issue an instruction setting forth this information for use in their respective states. State Directors and County supervisors will inform the news media including newspapers, radio, and television in the affected counties of the provisions of P.L. 93-237.

* * * * *

§ 1832.83 Emergency loans at 1 percent interest with forgiveness benefits.

(a) In all counties in which EM loans have been authorized because of a major disaster as determined by the President; a natural disaster as determined by the Secretary of Agriculture; or isolated production losses



losses as authorized by the State Director (all of which are hereinafter referred to as "disaster(s)"), where the disaster(s) occurred after December 26, 1972, but prior to April 20, 1973, the following will apply:

(1) The interest rate will be 1 percent.

(2) The principal of each EM loan will be canceled to the extent of the loss, damage, or injury resulting from the disaster not compensated for by insurance or otherwise in an amount not to exceed $5,000.

(3) Applicants will not be required to prove that they are unable to obtain their credit needs elsewhere as a test for eligibility.

(b) An applicant having qualifying losses may receive a separate principal cancellation in connection with each EM loan he might receive as a result of disaster losses occurring after December 26, 1972, but prior to April 20, 1973. However, the total amount authorized to be canceled for the same borrower either by the Small Business Administration and/or the Farmers Home Administration will not exceed $5,000 for a single disaster.

* * * * *

**APPENDIX H**

UNITED STATES DEPARTMENT
OF AGRICULTURE
FARMERS HOME ADMINISTRATION
Gainesville, Florida 32602

February 28, 1974
Reply to Attn of: FP

SUBJECT: M345 Disaster—Informing Potential Applicants and EM Borrowers of Public Law 93-237

TO: County Supervisors, FHA
Chiefland
Glen St. Mary
Lake City
Live Oak
Madison
Tallahassee

Assistant County Supervisor, FHA
Fernandina Beach, Florida

Attached is a sample letter and a news item prepared by the National Office. The letter is to be sent to present borrowers who obtained loans under Designation M345 which is described in Florida Instruction 441.2A, paragraph II.

The news article is to be placed in the local paper serving the county in which the disaster occurred.

/s/ John D. Carver, Jr.
For
CLAUDE L. GREEN, JR.
State Director

Enclosures
cc: DD—II
DD—III
OMAa
OMAb

* * * * *



**EXHIBIT C**
**SAMPLE PRESS RELEASE**

[Feb. 28, 1974]

UNITED STATES DEPARTMENT
OF AGRICULTURE
Farmers Home Administration
Town , State

For further information
Call _____
Telephone: _____

EMERGENCY LOANS AVAILABLE
FROM FARMERS HOME:

Farmers (and ranchers) in (name) county, (state name), who sustained production or physical losses as a result of the (type of disaster—drought, flood, hail, etc.) which struck during (indicate the period involved) may be eligible to receive an emergency loan from the Farmers Home Administration.

Those who have not received an emergency loan to assist them in recovering from their loss may apply for such a loan at the Farmers Home Administration county office at (street address), (name of town), before close of business (insert termination date supplied by State Director.)

These loan applications will be taken under the terms of a new law (P.L. 93-237) enacted January 2, 1974. Individual examination will be made of each application to determine date of the disaster occurrence and type of emergency loan benefits for which the applicant is eligible.

Farm emergency loans may include funds to repair or restore damaged farm property as well as reimburse applicants for expenses already incurred for such purposes. Loans based on qualifying production losses may

include funds to reimburse applicants for production expenses which went into damaged or destroyed crop and livestock enterprises, but not to produce new crops during 1974. Payment terms depend on the purposes for which the loan is used and the applicant's payment ability. No loan may exceed the actual loss sustained.



## APPENDIX I

1. Pub. L. No. 93-237, 87 Stat. 1024-1025, provided in pertinent part:

> SEC. 4. Notwithstanding the provisons of Public Law 93-24, the Secretary of Agriculture shall continue to exercise his authority with respect to natural disasters which occurred after December 26, 1972, but prior to April 20, 1973, in accordance with the provisions of section 5 of Public Law 92-385 as such section was in effect prior to April 20, 1973.
>
> * * * * *
>
> [SEC. 10.] (c) With regard to all disasters occurring on or after December 27, 1972, the Secretary of Agriculture shall extend for ninety days after the date of enactment of this section the deadline for seeking assistance under section 321 of the consolidated Farm and Rural Development Act as amended by this section.
>
> * * * * *

2. Pub. L. No. 93-24, 87 Stat. 24-25, provided in pertinent part:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That subsections (a), (b), (c), (d), (e), and (f) of section 328 of the Consolidated Farm and Rural Development Act, as amended by Public Law 92-385, are repealed.
>
> * * * * *
>
> SEC. 3. Subsection (b) of section 321 of the Consolidated Farm and Rural Development Act is amended by deleting said subsection in its entirety and substituting in lieu thereof:
>
> "(b) The Secretary shall make loans in any such area designated by the Secretary in accordance with subsection (a) hereof and in any area desig-

nated as a major disaster by the President pursuant to the provisions of the Disaster Relief Act of 1970, as amended, (1) to established farmers, ranchers, or oyster planters who are citizens of the United States and (2) to private domestic corporations or partnerships engaged primarily in farming, ranching, or oyster planting: *Provided*, That they have experience and resources necessary to assure a reasonable prospect for successful operation with the assistance of such loan, and are unable to obtain sufficient credit elsewhere to finance their actual needs at reasonable rates and terms, taking into consideration prevailing private and cooperative rates and terms in the community in or near which the applicant resides for loans for similar purposes and periods of time."

SEC. 4. Section 324 of the Consolidated Farm and Rural Development Act is amended by striking out "3 per centum" and inserting in lieu thereof "5 per centum".

* * * * *

SEC. 8. Notwithstanding the repeal herein in section 5 of Public Law 92-385, and notwithstanding any other provision of law, the Secretary of Agriculture shall make loans in accordance with the provisions of section 5 of Public Law 92-385 to eligible applicants in natural disaster areas determined or designated by the Secretary of Agriculture where such determination or designation had been made after January 1, 1972 and prior to December 27, 1972. The authority to accept applications for such loans shall expire 18 days after the effective date of this Act.



3. Section 5 of Pub. L. No. 92-385, 86 Stat. 557-559 provided:

SEC. 5. Subtitle C of the Consolidated Farmers Home Administration Act of 1961, as amended (7 U.S.C. 1961-1967), is amended by adding at the end thereof the following new section:

"SEC. 328. (a) Notwithstanding any other provision of law, in the administration of this subtitle and the rural housing loan program under section 502 of title V of the Housing Act of 1949, as amended (42 U.S.C. 1472), in the case of property loss or damage or injury resulting from a major disaster as determined by the President or a natural disaster as determined by the Secretary of Agriculture which occurred after June 30, 1971, and prior to July 1, 1973, the Secretary—

"(1) to the extent such loss or damage or injury is not compensated for by insurance or otherwise, (A) shall cancel the principal of the loan, except that the total amount so canceled shall not exceed the greater of (i) 50 per centum of the original principal amount of such loan but not more than $5,000, or (ii) the per centum that would be canceled of a loan of the same size by the Small Business Administration under section 7(b) of the Small Business Act, as amended (15 U.S.C. 636(b)), and (B) may defer interest payments or principal payments, or both, in whole or in part, on any loan made under this section during the first three years of the term of the loan, except that any such deferred payments shall bear interest at a rate per annum to be determined by the Secretary of the Treasury under section 234 of the Disaster Relief Act of 1970 (42 U.S.C. 4453), or that established by the Small Business Administration under section 7(b) of the Small Business Act, as amended (15 U S.C.

636(b)), whichever is lower: *Provided*, That no one borrower shall be eligible to receive more than one such cancellation for any single disaster.

"(2) to the extent such loss or damage or injury is not compensated for by insurance or otherwise, may grant any loan for repair, rehabilitation, or replacement of property damaged or destroyed, without regard to whether the required loan is otherwise available from private sources: *Provided*, That in the case of any loan for refinancing, either under clause (3) of this subsection or under section 322 of this subtitle, require the borrowers to demonstrate that they are unable to obtain sufficient credit elsewhere to finance their actual needs at reasonable rates and terms, taking into consideration prevailing private and cooperative rates and terms in the community in or near which the applicant resides for loans for similar purposes and periods of time.

"(3) may, in the case of the total destruction or substantial property damage of homes or farm service buildings and related structures and equipment, refinance any mortgage or other lien outstanding against the destroyed or damaged property if such property is to be repaired, rehabilitated, or replaced, except that the amount refinanced shall not exceed the amount of the physical loss sustained. Any such refinancing shall be subject to the provisions of clauses (1) and (2) of this subsection.

"(4) shall require the recipient of any emergency loan made under this section to execute the agreement to refinance required by section 333(c) of this title: *Provided*. That any such loan shall be reviewed at not less than two-year intervals to determine if the agreement to refinance shall become applicable.



"(b) Notwithstanding any other provision of law, the provisions of subsection (a) of this section shall also apply to the administration of the programs referred to in such subsection in the case of any property loss or damage or injury, including loss or damage to agricultural crops, resulting from flood or excessive prolonged rain, drought, or other natural disaster occurring after June 30, 1971, and prior to July 1, 1973, in any area determined by the President to be a major disaster area or in any area determined by the Secretary of Agriculture to have suffered a natural disaster during such period.

"(c) Any loan made under this section shall not exceed the current cost of repairing or replacing the disaster loss or damage or injury in conformity with current codes and specifications. Any loan made under this section shall bear interest at a rate per annum to be determined by the Secretary of the Treasury under section 234 of the Disaster Relief Act of 1970 (42 U.S.C. 4453), or that established by the Small Business Administration under section 7(b) of the Small Business Act, as amended (15 U.S.C. 636(b)), whichever is lower.

"(d) In the administration of any Federal disaster loan program under the authority of this section, the age of any adult loan applicant shall not be considered in determining whether such loan should be made or the amount of such loan.

"(e) The benefits provided under this section shall be applicable to all loans qualifying hereunder, whether approved before or after the date of enactment of this section.

"(f) The President shall conduct a thorough review of existing disaster relief legislation as it re-

lates to emergency loans and housing loans administered by the Farmers Home Administration of the United States Department of Agriculture, and not later than January 31, 1973, he shall transmit to the Committee on Agriculture and Forestry of the Senate and the Committee on Agriculture of the House of Representatives a report containing specific legislative proposals for the comprehensive revision of such legislation in order to—

"(1) adjust the benefits and the coverage available to persons affected by disasters;

"(2) improve the execution of the program by simplifying and eliminating unnecessary administrative procedures; and

"(3) prevent the misuse of benefits made available under the program."



**APPENDIX J**

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 81-5365

---

RONALD E. PAYNE, Individually and on behalf of himself and others similarly situated,
Plaintiffs-Appellees,

*versus*

JOHN R. BLOCK, Individually and as Secretary of the United States Dept. of Agriculture, et al.,
Defendants-Appellants,

*versus*

JAMES E. COLLINS, Movant-Appellant-Intervenor.

---

Appeal from the United States District Court for the Middle District of Florida

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[FILED MARCH 19, 1985]

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**ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC**

(Opinion 1/31/85, 11 Cir., 198[5], [751] F.2d [1191]).

Before GODBOLD, Chief Judge, HENDERSON and CLARK, Circuit Judges.

PER CURIAM:

(✔) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be

polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

Thomas A. Clark
United States Circuit Judge

REHG-6
(Rev. 6/82)

# OPPOSITION

# BRIEF

No. 84-1948

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

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JOHN R. BLOCK, SECRETARY OF AGRICULTURE, *et al.*,
*Petitioners,*

v.

RONALD E. PAYNE, *et al.*,
*Respondents.*

---

## RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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## QUESTION PRESENTED

The respondents disagree with the question stated by the Petitioner, as equitable estoppel was specifically rejected as the basis for the decision below. Consideration of the applicability of the doctrine, if any, to government agencies is unnecessary to determine:

**WHETHER A COURT MAY REMEDY A "GROSS FAILURE ON THE PART OF AN ENTIRE AGENCY" TO COMPLY WITH REGULATIONS REQUIRING SPECIFIC NOTICE OF BENEFITS TO CONGRESSIONALLY INTENDED BENEFICIARIES BY COMPELLING NOTICE UNLAWFULLY WITHHELD AND AFFORDING AN OPPORTUNITY, FOLLOWING NOTICE, FOR THOSE OBJECTIVELY ELIGIBLE TO APPLY.**

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IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1984

---

NO. 84-1948

JOHN R. BLOCK, SECRETARY OF
AGRICULTURE, ET AL., PETITIONERS

v.

RONALD E. PAYNE, ET AL.,

---

# RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

---

The Respondents oppose the Petition for a Writ of Certiorari filed by the Solicitor General on behalf of the Secretary of Agriculture and other officials of the Farmers Home Administration (FmHA).

## STATUTES AND REGULATIONS INVOLVED

The Petitioner has omitted reference to 7 C.F.R. §1832(3)(a)(1) 1973, which is set forth in full in the Circuit Court Opinion, Petitioner's Appendix p. 7a.

## STATEMENT

### A. The Initial Loan Application Period

In April, 1973, the "worst flood in 25 years" caused severe agricultural losses estimated by the FmHA to be in excess of $3,800,000. The President declared thirteen counties in North Florida a major disaster area in May, 1973.[1]

As a result of this disaster declaration, the FmHA was directed by Congress[2] to make emergency loans available to objectively qualified farmers who sustained agricultural losses. The FmHA,

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[1] App. 35a. References to "App ___" are to the Petitioners' Appendix. References to "Tr. ___" are to the trial transcript .

[2] 7 U.S. Code §1961(b)(1973) provides, in pertinent part: "The Secretary shall make loans in any ... area designated by the President ... to established farmers ... ."



by regulation,[3] required that specific types of notice be provided to eligible farmers, so that they could apply for these emergency loans.

The FmHA violated its own mandatory regulations designed to provide specific types of notice to eligible farmers.[4] In addition, it affirmatively discouraged potential applications from eligible farmers by telling them that no relief was

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[3] C.F.R. §1832.3(a)(1)(1973). Although the district court characterized the "crucial issue" as "whether the FmHA complied with its own regulations" (App. 37a), the Petitioner has omitted any reference to this regulation in its Petition.

[4] The Petitioners' continued assertion that the FmHA's liability arises from a "simpl[e] ... failure of the press release to specify the favorable terms of the ... program" completely ignores the fact that the agency violated separate, specific

available to them, which was incorrect.[5] During the initial loan application period, FmHA's sole effort at notification was a single press release which affirmatively misstated the deadline for applications as 26 days. In fact, the application deadline for crop losses was nine months.[6]

As a result of the FmHA's violation of

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notice requirements in 7 C.F.R. §1832.3(a)(1)(1973). See App. 15a. The FmHA failed to notify county supervisors (App. 38a), state and county USDA Defense Board Chairmen and other agricultural lenders (App. 39a) and failed, as a matter of law, to make "such public announcements as appear appropriate" of the availability of emergency loans (App. 40a), in direct violation of 7 C.F.R. §1832.3(a)(1)(1873) (App. 7a).

[5] App. 37a-38a.

[6] This misstatement of the deadline for emergency loan applications is particularly significant because eligible farmers would not be able to determine the



its own regulations, and its affirmative actions in discouraging applications, no applications were received by the Farmers Home Administration during the initial loan application period. The State FmHA Director professed to be "flabbergasted" by this lack of response.[7]

B. The Extended Loan Application Period

Shortly before this disaster declaration, the then Secretary of the FmHA had unilaterally decided to withhold funds from programs including the emergency loan program, which he deemed "least

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extent of crop losses until later in the application period, at harvest time. Tr.425-26.

[7] App. 39a. The FmHA State Director testified that "on numerous occasions" press releases were forwarded to the media, but were not published.

essential," on the basis of his "subjective judgment."[8] In response, Congress extended the application period for previously declared disasters, including this declaration.[9] Congress was "concerned that administratively set deadlines ... may expire, thus precluding ... farmers ... from applying for benefits ... ."[10] Congress therefore mandated that the FmHA extend the deadline for seeking relief from previously declared disasters, including the disaster here at

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[8] App. 11a-12a. See Berends v. Butz, 357 F. Supp. 143 (D. Minn. 1973).

[9] Public Law 93-237 §4, 87 Stat. 1024 (1974).

[10] Conf. Rep. No. 93-363, 93rd Cong., 1st Sess. 2, reprinted in 1973 U.S. Code Cong. & Ad. News 3342, 3343-44.



issue. "In an apparent attempt to persist in executive budgetary goals, the agency merely withheld appropriate notice of the loan program." [11]

Although the FmHA concluded that "a delay in implementing the provisions of (Pub. L. 93-237)... would be contrary to the public interest."[12] The agency withheld any notification of this congressionally mandated extension of disaster benefits until two-thirds of the 90 day application period had expired.[13]

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[11] App. 12a.

[12] See 7 C.F.R. §1832.82(a), App. 52a.

[13] Local FmHA officials testified that their first notice of the new loan program, or the extended application period, came from Ronald Payne. Tr. 427.

During the extended application period, the FmHA again violated its regulations requiring specific notice to eligible beneficiaries.[14] Local FmHA officials continued to tell farmers who inquired about the availability of emergency loans that no such loans were available.[15] Although regulations adopted by the FmHA to implement the congressional extension of benefits required the FmHA to "inform the news media ... of the provisions of

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[14] Again, the specific notice required by 7 C.F.R. §1832 was not provided. A similar notice, required by an amendment to the regulations effective July 30, 1973, required the FmHA to notify the county governing body. This notice was not given. (App. 24a, n. 32).

[15] Tr. 683, 685.



P.L. 93-237" [16], only one press release was routinely forwarded to local media. This release failed to advise the public of "the critically important new terms of the $5,000.00 forgiveness or 1% interest, nor did it recite the change in the requirement that no other credit be available."[17]

Only four emergency loans were actually granted by the FmHA for this disaster during the second loan application period.[18] Three of these loans were the direct result of Ronald Payne's

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[16] App. 25a, quoting 39 Fed. Reg. 7570 (1974), emphasis by the court.

[17] App. 40a.

[18] By contrast, the Agricultural Stabilization and Conservation Service, a sister agency to the FmHA, made 310 grants to farmers "to control severe ... erosion on farm lands or to rehabilitate farm

insistence that emergency relief was, in fact, available.[19] Mr. Payne attempted to notify other farmers, but they did not believe that such assistance was available "because (they) did not hear it from other sources."[20]

In August, 1976, a class action lawsuit was filed in the United States District Court for the Middle District of Florida, seeking to compel minimally adequate notice of the emergency loan benefits to eligible farmers. On February 11,

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lands damaged by ... floods..." in only seven of the thirteen counties involved in this disaster. Def. Ex 20. FmHA officials conceded that severe erosion is likely to cause crop losses. Tr. 952.

19 Tr. 762-65.

20 Id. No testimony was presented showing that notice was received by any eligible farmer through the efforts of the FmHA. Both applicants, Ronald Payne and "Red" Walker, applied after receiving a congressional newsletter stating that emergency relief was, in fact, available.



1981, following a non-jury trial, the district court entered its final order finding that the FmHA had violated its own regulations; had incorrectly told farmers seeking loans that no loans were available; had issued a press release which misstated the application deadline for benefits; had failed to inform the public of the "critically important" provisions of Public Law 93-237; and had generally "failed to make such public announcements as were appropriate, as a matter of law."[21]

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21 App. 40a-43a.

The district court ordered the FmHA to provide the notice required by its own regulations, and to accept and process applications from objectively eligible farmers for a 60 day period following that notice.[22]

On appeal, the United States Court of Appeals for the Eleventh Circuit affirmed, finding that "[t]he liability of the agency in this case is grounded in Congress' enactment of legislation directing the [agency] to implement the terms of the legislation, the agency's passage of implementing regulations, and the agency's failure to following the resulting affirmatively required

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[22] The Petitioners make much of the fact that the relief afforded by the Trial Court requires notice which should have been afforded in 1973 and 1974. Neither



procedure."[23]

This Court vacated the circuit court opinion, and remanded for further consideration in light of Heckler v.Community Health Services, No. 83-56 (May 21, 1984).

On remand, the circuit court adhered to its prior decision, determining that "[t]he Plaintiffs did not seek relief based on reliance upon agency action that created an estoppel. The Plaintiffs

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statute of limitations nor laches were raised as an affirmative defense by the Government below. The district court's order has been stayed, at the request of the Petitioners, for over five years.

[23] App. 19a. While the circuit court, on rehearing, indicated that its characterization of the notice requirements as a "regulation" "may have been overbroad" (App. 32a), the court could not "approve

alleged and proved to the satisfaction of the district court that the agency failed to act in accordance with the law."[24]

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agency actions contrary to congressional or administratively mandates which frustrate benefit programs statutorily authorized and funded by Congress." App. 32a-33a.

[24] App. 2a. [Emphasis by the court.]



## ARGUMENT

### I

**WHERE CLEAR CONGRESSIONAL INTENT TO PROVIDE BENEFITS TO OBJECTIVELY ELIGIBLE FARMERS IS FRUSTRATED BY THE "GROSS FAILURE OF AN ENTIRE AGENCY" TO PROVIDE SPECIFIC NOTICE OF THOSE BENEFITS IN VIOLATION OF ITS OWN REGULATIONS, A DISTRICT COURT MAY ORDER THAT SUCH NOTICE BE PROVIDED, AND THAT THE BENEFITS REMAIN AVAILABLE TO THOSE OBJECTIVELY ENTITLED TO RECEIVE THEM, UNDER THE COURT'S POWER TO "COMPEL AGENCY ACTION UNLAWFULLY WITHHELD" AND TO "SET ASIDE AGENCY ACTION" TAKEN "WITHOUT OBSERVANCE OF THE PROCEDURE REQUIRED BY LAW." UNDER 5 USC §706.**

The primary argument advanced by the Petitioner is that the administrative deadline for filing applications has the "force and effect of law". Therefore, a court may not extend that deadline, even to insure that Congress' intent is not

frustrated by agency inaction in violation of other, equally binding regulations. This conclusion, it is argued, is required by this court's recent decisions,[25] declining to apply the doctrine of equitable estoppel to federal agencies.

The circuit court expressly rejected equitable estoppel as a basis for its decision.[26] The trial court simply compelled agency compliance with specific notice required by regulation to be afforded prior to the application deadline, as a condition of the

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[25] Schweiker v. Hansen, 450 U.S. 785 (1981); INS v. Miranda, 459 U.S. 14 (1982); Heckler v. Community Health Services, No. 83-56 (May 21, 1984).

[26] While the respondents do not concede the inapplicability of equitable estoppel on these facts, see part II, infra, that question is neither necessary for, nor dispositive of, a decision in this case.



termination of benefits to those eligible to apply for them.

In cases brought under the Administrative Procedures Act, where a court is confronted with "agency violations of their own regulations ..." it may require compliance "with the standards of agency action which the APA directs the Courts to enforce."[27] Under both general equitable powers and the powers granted under the Administrative Procedures Act, courts can ensure that statutory rights

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[27] Petition at pgs. 20-21, citing United States v. Caceres, 440 U.S. 741, 754 (1979).

are not denied by agency inaction. See, e.g. Caswell v. Califano, 583 F.2d 9, 15-16 (1st Cir. 1978)."[28] "It is clear that Section 706(1) applies to a situation where a federal agency refuses to act in disregard of its legal duty to act." E.E.O.C. v. Liberty Loan Corp., 584 F2d 853, 856 (8th Cir. 1978). "The law simply will not tolerate the denial of rights by unwarranted official inaction." British Airways v. Port Authority of New York, 564 F.2d 1002, 1010 (2nd Cir. 1977).

Conceding that the Trial Court could direct the Secretary of Agriculture to comply with its own regulations,

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28 The Petitioner's assertion that this suit "cannot be considered one for judicial review" under the APA is not well taken. The Plaintiffs' Complaint specifically requested relief under the APA, for the failure of the FmHA to act [see 5 U.S.C. §551(13)] in providing notice of relief, as defined in 5 U.S.C. §551(11)(a). This Court's decision in FTC v. Standard Oil Company, 449 U.S. 232 (1980), holds only that decision to institute administrative proceedings is not "agency action" reviewable by the court. Mathews v. Eldridge, 424 U.S. 319 (1976), did not determine whether the trial court had jurisdiction under the Administrative Procedures Act. Id. at n. 12.



Petitioner asserts that such authority expired with the administratively set deadline for applications.[29]

This argument seeks to equate the congressional extension of benefits to a congressional termination of those benefits, and overlooks the context in which

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29 "Thus ... the agency is left in the absurd position of arguing that it can disobey a congressional mandate to make loans available to eligible farmers but has no authority to make loans in cases of inadequate notice because Congress did not mandate an extension of time for those

P.L. 93-237 was passed.[30] The extension of emergency loan benefits was intended by Congress to remedy a secretarial curtailment of loan grants. None of this Court's decisions suggest that an agency should be allowed to "totally fail to provide notice to congressionally intended potential beneficiaries and avoid being called to task for such conduct."[31]

First, "[i]t is always within the discretion of a court or an administrator

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cases." App. 14a.

30 App. 18a.

31 App. 19a.



to relax or modify its ... rules for the orderly transaction of business before it when ... the ends of justice require it." Health Systems Agency of Oklahoma, Inc. v. Norman, 589 F.2d 486, 489 (10th Cir. 1978), quoting American Farm Lines v. Black Ball Freight Services, 397 U.S. 532, 539, and N.L.R.B. v. Monsanto Chemical Co., 205 F.2d 763, 764 (8th Cir. 1953).

This is especially true when, to hold otherwise would allow an agency violation of its own rules to frustrate the clear intent of Congress. An agency may not do through inaction what it cannot do through negation. See e.g. Train v. City of New York, 420 U.S. 35 (1975), Berends v. Butz, 357 F.Supp. 145 (D. Minn. 1973).

In this case, the public notice required by regulations to ensure application

would be filed by those who qualified was withheld, and the FmHA actively discouraged those applications. "[B]asic notions of fairness must preclude the government from taking advantage of the [FmHA's] dereliction ... ." Corniel-Rodriquez v. Immigration and Naturalization Service, 532 F.2d 301, 302 (2nd Cir. 1976).

Consistent with FCIC v. Merrill, 332 U.S. 380 (1947) and Heckler v. Community Health Services, No. 83-56 (May 21, 1984), the district court's order does not provide benefits to those who are not objectively entitled to receive them under the congressionally mandated benefit scheme. Nor does this Court's decision in Schweiker v. Hanson, 450 U.S. 785 (1981), require that lower courts sanction



agency action which frustrates the congressional policy which underlies a statute. Compare Federal Maritime Commission v. Seatrain Lines, Inc., 411 U.S. 726, 745-46 (1973); NLRB v. Brown, 380 U.S. 278, 291, (1965).

Where an objectively eligible beneficiary fails to apply for congressionally intended relief because of the agency's unlawful failure to provide proper notice of that benefit, the district court has jurisdiction to require notification prior to a termination of those benefits. See Grueschow v. Harris, 633 F.2d 1264 (8th Cir. 1980), Armstrong v. United States, 516 F.Supp. 1252 (D.Colo.1981), see also Meister Brothers, Inc. v. Macy, 674 F.2d 1174 (7th Cir. 1982).

This Court has repeatedly held that,

where "an agency ... sought to deny an individual a benefit to which he is entitled by law ... in a procedurally irregular manner ... [the court should] ... set aside... that agency action."[32] The necessary corallary to that rule is that, once the required procedure is followed by the agency, the benefit must be available to those entitled by law to apply for it.

The lower court correctly held that "[b]efore the [FmHA] may extinguish the entitlement of these otherwise eligible beneficiaries ...." of the congressional loan program, "it must comply, at a

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32 Service v.Dulles, 354 U.S. 363, 388 (1857); Vitarelli v. Seaton, 359 U.S. 535, 539-40 (1959); Morton v. Ruiz, 415 U.S. 199, 235 (1974); United States ex.



minimum, with its own internal procedures." Morton v. Ruiz, 415 U.S. 199, 235 (1974).

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rel. Accardi v. Shaughnessy, 347 U.S. 260, 267 (1954).

II

Although neither pled, argued nor relied upon by either the court of appeals or the district court, respondents do not concede that estoppel would be unavilable to prevent the FmHA from applying its administrative deadline to foreclose objectively eligible farmers from demonstrating their entitlement to congressionally authorized loan benefits.[33]

The decision here does not threaten the public fisc, in that the district court limited the plaintiff class to those farmers who were eligible to apply for benefits, but received no notice as

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[33] The relief afforded by the district court was also required by the Due Process clause. The FmHA's violation of its regulations constitute a denial of procedural due process which the district court should remedy by use of its broad equitable powers. Califano v. Yamasaki, 442 U.S.



required by FmHA regulations.[34] Unlike FCIC v. Merrill, supra, Community Health Services v. Heckler, supra, plaintiffs will receive nothing beyond the benefits which Congress intended.

The Plaintiffs' failure to insist upon filing an application in the face of repeated FmHA assertions that no benefits were available, with local agents who were unaware of the program, can hardly be characterized as unreasonable. It is, instead, exactly "the kind of reasonable reliance that would ... give rise to an

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682 (1979); Porter v. Warner Holding Co., 328 U.S. 395 (1946); Scripps Howard Radio v. FCC, 316 U.S. 4 (1942).

[34] The government does not contend that funding for this program is no longer available. The funds continue to be made available by Congress. App. 15a, n. 22. It suggests, rather, that the passage of the application deadline deprived both itself and the district court of the ability to direct those funds as Congress intended.

estoppel against a private party."[35] Community Health Services v. Heckler, supra, at p. 14. Compare, Portmann v. U.S., 674 F.2d 1155 (7th Cir. 1982), McDonald v. Schweiker, 537 F.Supp. 47 (N.D. Ind. 1981).

Where the affirmative misconduct[36] of an entire agency requires the application of estoppel to prevent administrative frustration of congressional intent, the doctrine should be applied by the court to ensure that benefits flow to those entitled to receive them. Meister Bros., Inc. v. Macy, supra, McDonald v. Schweiker, supra, and Armstrong v. U.S., supra.

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35 To suggest that the FmHA's violations "did not cause the respondent[s] to ... fail to take action" that they "could ... correct at any time" [Petition at p. 16, n. 11] is to wholly misconceive the facts as found by the district court.

36 Although the district court made no explicit finding of affirmative misconduct, the evidence clearly supports that finding. See circuit court opinion, App. 21a, n.



## CONCLUSION

The trial court properly "compel[led] agency action unlawfully withheld" by mandatory injunction pursuant to 5 U.S.C. §706(1); required the FmHA to provide notice to eligible farmers; and afforded an opportunity to apply for benefits to which they were entitled. "To hold otherwise would allow [the agency] to totally fail to provide notice to congressional intended potential beneficiaries and avoid being called to task for such conduct." [circuit court opinion, App. 32a].

The petition for certiorari should be denied.

Respectfully submitted,

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# REPLY

# BRIEF

No. 84-1948

# In the Supreme Court of the United States

OCTOBER TERM, 1985

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, ET AL., PETITIONERS

*v.*

RONALD E. PAYNE, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## REPLY BRIEF FOR THE PETITIONERS

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relevance of this Court's decisions rejecting the application of equitable estoppel to limit the government's ability to enforce the law. Thus, the court of appeals addressed the government's argument that *Schweiker* v. *Hansen*, 450 U.S. 785 (1981), is controlling here, seeking to distinguish that case on several factual grounds (Pet. App. 19a-21a).[1] Those purported distinctions are untenable for the reasons stated in our petition (at 14-16 & n.11). Respondents' conclusory reference to *Hansen* (Br. in Opp. 22-23) entirely fails to address this argument. The decision below plainly cannot be reconciled with *Hansen*.[2]

The court of appeals' suggestion in its opinion on remand that its decision did not rest on equitable estoppel (Pet. App. 2a) cannot be dispositive. In the first place, the court of appeals reinstated its earlier decision (*id.* at 3a) which, as we have shown, considered (but erroneously distinguished) this Court's estoppel decisions. More fundamentally, the Court's teaching that the United States "may not be estopped on the same terms as any other litigant" (*Heckler*

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[1]Respondents' suggestion (Br. in Opp. 26) that the government did not argue and that the court of appeals did not consider the estoppel issue raised here is frivolous. The court of appeals expressly acknowledged (Pet. App. 19a) the government's reliance on *Hansen*, and it also undertook to distinguish (albeit on insubstantial factual grounds) *INS* v. *Miranda*, 459 U.S. 14 (1982), another of this Court's estoppel decisions (Pet. App. 20a n.27). See also Gov't C.A. Br. 17-23.

[2]Contrary to respondents' contention (Br. in Opp. 22), the decision here does indeed require the government to provide benefits to persons who are not entitled to receive them, since they did not file applications within the time period mandated by law. If respondents' argument is that the government may be estopped from enforcing procedural, but not substantive, eligibility requirements, this argument is flatly inconsistent with *Hansen*. There, the Court held that a person who was substantively eligible for benefits could not estop the government from raising her failure to adhere to required procedures as a ground for denying those benefits. 450 U.S. at 790.



v. *Community Health Services*, slip op. 8 (footnote omitted)) cannot be circumvented by the exercise in semantics in which respondents and the court of appeals engage. As we explained in our petition (at 23), whatever the label, the relief awarded by the courts below — reopening an expired emergency loan program in contravention of an explicit deadline having the force of law, because of the responsible agency's failure sufficiently to publicize the program — entails application of equitable estoppel as this Court has most recently defined that term: "[w]hen the Government is unable to enforce the law because [of] the conduct of its agents" (*Community Health Services*, slip op. 8). As the Eleventh Circuit recognized in another case affirming an estoppel against the government, "equitable estoppel precludes a litigant from asserting a claim or defense that might otherwise be available." *FDIC* v. *Harrison*, 735 F.2d 408, 410 (1984). The court of appeals' judgment undeniably estops FmHA from rejecting respondents' loan applications on the ground that they are more than a decade out of time. Respondents offer nothing to rebut this conclusion.

2. In any event, the relief awarded in this case is not authorized by the APA or the principles of administrative law upon which respondents rely. Scarcely pausing to address our arguments (Pet. 20-22),[3] respondents assert (Br. in Opp. 16-18, 23-25) that overriding of the applicable deadline for filing a loan application with FmHA constitutes "comp[ulsion of] agency action unlawfully withheld" within the meaning of 5 U.S.C. 706(1). They thus ignore the

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[3]Respondents take issue with our demonstration that the absence of reviewable agency action in this case makes APA review unavailable (Pet. 20 n.13) merely by relying on the allegations in their complaint (Br. in Opp. 18 n.28), which, of course, are hardly dispositive.

fact that the only agency action the court of appeals determined to have been improperly withheld here was the dissemination of a sufficiently informative press release.[4] The reopening of an entire expired loan program in violation of the application deadline established by law cannot accurately be characterized as simply compelling the agency to remedy a publicity defect.

Respondents rely (Br. in Opp. 23-25 & n.32) on this Court's decisions recognizing that agency action taken in disregard of an agency's own procedural regulations may be set aside upon judicial review. But — again ignoring our argument (Pet. 20-22) — respondents do not even attempt to show that any of these decisions irrevocably conferred upon a private party substantive benefits for which that person was ineligible as a matter of law.[5] Of course, that is precisely what the court of appeals did in this case.

The court of appeals' decision thus finds no support in the administrative law doctrines invoked by respondents. Indeed, that is the necessary implication of *Hansen* itself, a suit for judicial review of administrative action. See 450

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[4]Respondents' contention (Br. in Opp. 3-4 & n.4) that FmHA's liability rests on violations separate from the content of the press release disregards the court of appeals' express refusal to decide whether other notice requirements were violated (Pet. App. 25a). Similarly, their assertion (Br. in Opp. 3 n.3) that we ignored a crucial regulation, 7 C.F.R. 1832.3(a)(1) (1973), is wrong on two counts. First, we did cite the regulation (Pet. 7); second, the court of appeals concluded that the regulation was "only peripheral[]" (Pet. App. 24a) and did not decide whether it had been violated (see Pet. 8 n.9).

[5]Respondents' reliance (Br. in Opp. 19) on "the context" of the benefit program is unavailing. Contrary to their argument (*id.* at 16-17), nothing in the relevant statutes indicates a congressional intent that the application deadline was conditional on the agency's compliance with its publicity regulations or that the deadline would otherwise be rendered a legal nullity if the agency failed to comply with those regulations.



U.S. at 787 & n.3.[6] Again, in *INS* v. *Miranda*, 459 U.S. 14, 16 (1982), this Court enforced its strictures against application of equitable estoppel in a case involving agency action subject to judicial review. Most recently, this Court's decision in *Community Health Services* confirms that the estoppel rulings upon which we rely may not be circumvented by casting a claim as one for judicial review of administrative action. See slip op. 6.

3. Finally, respondents contend that estoppel of the government is appropriate in this case (Br. in Opp. 26-28). Their argument that the court of appeals' decision would not impose an unwarranted burden on the Treasury is answered in our petition (at 14-15).[7] In arguing that their failure to apply for loans or to seek further information was reasonable and that the agency engaged in affirmative misconduct, respondents ignore the court of appeals' decision. The court of appeals expressly declined to decide whether the agency had made any misrepresentations or had

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[6]If, as respondents urge, the APA (or analogous statutory provisions for judicial review of administrative action) renders inapplicable this Court's decisions rejecting application of equitable estoppel against the United States, *Hansen* itself should have been decided differently. On respondents' theory, Hansen should have been granted unlimited retroactive Social Security benefits, notwithstanding the statutory limit on the reach of such benefits, as a means of "compel[ling] agency action unlawfully withheld" (5 U.S.C. 706(1)) — *i.e.*, to fulfill the requirement of the Social Security Claims Manual that its employees advise applicants to file a written application for benefits even if their eligibility is doubted. See Pet. 22. Respondents do not answer this argument.

[7]To the extent that respondents appear to suggest that the financial burden is justified because Congress intended farmers to receive loans under the program, they ignore the more than ten years that have elapsed since the April 1973 flooding. As we explained in our petition (at 24-25), there is no reason to suppose that Congress intended these emergency loans to be available as a windfall long after the emergency had passed. Although respondents note this argument (Br. in Opp. 27 n.34), they make no attempt to answer it.

engaged in affirmative misconduct (Pet. App. 21a n.29), and it relied only on a single press release that it deemed insufficiently informative (*id.* at 24a). As we showed in our petition (at 18-19), the press release was ample to require a reasonable person to make further inquiries. Moreover, *Community Health Services* makes clear (slip op. 11-14) that any claim of entitlement to public benefits that is at variance with published agency regulations is an unreasonable one. Here, FmHA's Federal Register notice set forth all of the terms of the loan program and unambiguously fixed the loan application deadline. Any belief that tardy applications would be accepted or that the terms of the loans were less favorable than as described in the notice was unreasonable. Respondents, who failed to make appropriate inquiries and instead bided their time and filed this suit after the loan program expired, plainly are in no position to estop the government.

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES FRIED
*Acting Solicitor General*

SEPTEMBER 1985

DOJ-1985-09

# PETITIONER'S

# BRIEF

No. 84-1948 (4)

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## BRIEF FOR THE PETITIONERS

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## QUESTION PRESENTED

Whether the Secretary of Agriculture may be equitably estopped from enforcing a valid regulation establishing a deadline for filing of applications for Farmers Home Administration emergency loans on the ground that the agency's news release announcing the availability of loans did not specify the generous terms of the loan program.

## PARTIES TO THE PROCEEDING

In addition to the Secretary of Agriculture, the Administrator of the Farmers Home Administration, the State Director and Assistant State Director of the agency's Florida office, the FmHA County Supervisor for Madison County, Florida, and a District Supervisor of the FmHA were defendants below and are petitioners in this Court.* In addition to Ronald E. Payne, Carbie Ellie was an individual plaintiff below and is a respondent in this Court. Payne and Ellie were certified as representatives of a class of farmers in a 13-county area of north Florida covered by presidential disaster declaration M-345 who suffered losses from floods or storms in early April 1973 and who were eligible to apply for emergency loans administered by the FmHA but were not so notified by the agency (Pet. App. 46a-47a).

In the district court, James H. Collins attempted to intervene as a plaintiff representing a class of farmers in 27 states and Puerto Rico who had suffered losses as a result of natural disasters occurring between December 27, 1972, and April 19, 1973, and who had been eligible to apply for emergency loans. Collins appealed unsuccessfully from the denial of his motion to intervene (Pet. App. 27a-29a).

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* The complaint named various incumbent and past occupants of these offices as defendants in their individual capacities and sought damages from these defendants. The district court dismissed the claim for damages and no appeal was taken from that ruling. See Pet. App. 6a n.7. Thus, this action survives only against the various federal officials in their official capacities.

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### OPINIONS BELOW

The opinion of the court of appeals on remand from this Court (Pet. App. 1a-3a) is reported at 751 F.2d 1191. The initial opinion of the court of appeals (Pet. App. 4a-29a) is reported at 714 F.2d 1510. The supplemental opinion of the court of appeals on petition for rehearing (Pet. App. 30a-33a) is reported at 721 F.2d 741. The opinion of the district court (Pet. App. 34a-45a) is unreported.

### JURISDICTION

The judgment of the court of appeals on remand from this Court was entered on January 31, 1985. A petition for rehearing was denied on March 19, 1985 (Pet. App. 65a-66a). The petition for a writ of certiorari was filed on June 14, 1985, and was

granted on October 7, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTES AND REGULATIONS INVOLVED

Sections 4 and 10(c) of Pub. L. No. 93-237, 87 Stat. 1024-1025, Sections 1, 3, 4 and 8 of Pub. L. No. 93-24, 87 Stat. 24-25, and Section 5 of Pub. L. No. 92-385, 86 Stat. 557-559, are set forth at Pet. App. 59a-64a. The applicable regulations, 7 C.F.R. 1832.-81-1832.83 (1975), are set forth in pertinent part at Pet. App. 53a-55a.

## STATEMENT

1. a. For many years the Farmers Home Administration of the Department of Agriculture has administered a program of emergency loans designed to facilitate continuation of farming operations by farmers who have suffered crop losses or property damage as a result of natural disasters such as floods, storms, or drought. See Consolidated Farm and Rural Development Act §§ 321-330, 7 U.S.C. 1961-1971. From time to time Congress has adjusted the interest rates, credit conditions and forgiveness of indebtedness provisions of the emergency loan program. Generally, however, if crop yields are substantially and adversely affected by a formally declared natural disaster and losses are not covered by insurance, an affected farmer may apply for an emergency loan. See 7 U.S.C. 1961; 7 C.F.R. Pt. 1945; 7 C.F.R. Pt. 1832 (1974).

b. In early April 1973, heavy rains caused flooding, crop losses and property damage in a 13-county area of northern Florida. On May 26, 1973, the President declared this region to be a major disaster area. Pursuant to Section 321 of the Consolidated



Farm and Rural Development Act, 7 U.S.C. 1961, the Secretary of Agriculture was then authorized to make emergency loans to farmers suffering losses in the affected area. Under the terms of the emergency loan program in effect at the time of the disaster designation, emergency loans bore an interest rate of 5%, and applicants were required to show inability to obtain credit from ordinary commercial sources. See Pub. L. No. 93-24, §§ 3, 4, 87 Stat. 24-25. No provision was made for cancellation of any portion of the principal amount of the loan.[1] FmHA required applications for loans to cover crop losses to be filed within nine months of the formal disaster declaration. Thus, in the case of the north Florida floods of April 1973, applications were due no later than February 26, 1974. Pet. App. 4a-6a. Appar-

[1] By contrast, a different set of loan terms, much more generous to the borrower, had been in effect in 1972, pursuant to Section 5 of Pub. L. No. 92-385, 86 Stat. 557-559. Under the 1972 statute, emergency loans carried a 1% interest rate; eligibility was not conditioned upon unavailability of alternative sources of credit; and borrowers could have 50% of the loan principal, up to $5,000, cancelled at will.

Because the 1972 loan program triggered an unprecedented volume of loan applications, resulting in a severe drain on loan funds available to FmHA, the Secretary halted the making of emergency loans on December 27, 1972. In response, on April 20, 1973, Congress enacted Pub. L. No. 93-24, 87 Stat. 24 *et seq.* Section 1 of that Act repealed Section 5 of Pub. L. No. 92-385. Section 4 of Pub. L. No. 93-24 set a rate of 5% for new emergency loans. Section 3 imposed the requirement that credit be unavailable from alternative sources. A grandfather clause (§ 8, 87 Stat. 25) provided that loans to cover losses arising out of disasters declared prior to December 27, 1972, could still be sought under the 1972 loan program, if application was made within 18 days of the date of enactment—*i.e.*, by May 8, 1973. Pet. App. 10a-12a, 17a n.24.

ently no loans were made in the north Florida disaster area during this period (*id.* at 9a).

On January 2, 1974, however, Congress liberalized the terms and conditions for FmHA emergency loans with respect to natural disasters occurring between December 27, 1972, and April 20, 1973. The new law made available emergency loans bearing a 1% interest rate for eligible farmers who had suffered losses in this interval, authorized cancellation of 50% of the principal amount of indebtedness, up to $5,000, and dispensed with the requirement that applicants show the unavailability of credit from other sources. Pub. L. No. 93-237, § 4, 87 Stat. 1024.[2] Congress directed that the Secretary of Agriculture "extend for ninety days after the date of [the new] enactment" the otherwise applicable deadline for seeking emergency loan assistance, if the administrative deadline based on the date of the disaster declaration was earlier. Pub. L. No. 93-237, § 10(c), 87 Stat. 1025; see H.R. Rep. 93-363, 93d Cong., 1st Sess. 2 (1973). The effect of this provision was to enlarge the deadline for north Florida farmers to apply for emergency loans from February 26, 1974, through April 2, 1974, and to make available more favorable loan terms than previously had been offered.

On February 15, 1974, FmHA issued instructions to its staff and rules to implement the special emergency loan program created by Pub. L. No. 93-237.

[2] Technically, Section 4 provided that notwithstanding the provisions of Pub. L. No. 93-24, which had phased out the more generous loan program that had been in effect in 1972 under Pub. L. No. 92-385, the 1972 loan program terms would remain available to farmers who had suffered losses in natural disasters occurring between December 27, 1972, and April 20, 1973 (the date of enactment of Pub. L. No. 93-24). See page 3 note 1, *supra*.



Initially issued as staff Special Instruction 441.5 in unpublished form, the directive was published without material change in the Federal Register on February 27, 1974. 7 C.F.R. Pt. 1832, Subpt. E, at 39 Fed. Reg. 7569.[3] The Federal Register publication included all pertinent details concerning the terms and conditions of the special emergency loan program, including the 1% interest rate, the forgiveness provision, and the absence of any requirement that unavailability of other credit be demonstrated. 7 C.F.R. 1832.82(a) and 1832.83(a), at 39 Fed. Reg. 7570-7571 (1974) (Pet. App. 54a-55a). The regulations also specified that "the termination date for acceptance of applications * * * will be April 2, 1974" (*id.* at 54a).

In addition, although Pub. L. No. 93-237 did not require that the special loan program be publicized in any special manner, the agency's staff instructions stated:

> State Directors and County Supervisors will inform the news media including newspapers, radio, and television in the affected counties of the provisions of P.L. 93-237. A suggested news release for local use is attached as Exhibit C.

Pet. App. 49a, 54a.[4] The "suggested news release" was transmitted by the state FmHA director to local

[3] Pertinent portions of Special Instruction 441.5 as originally issued are reproduced at Pet. App. 48a-49a. Pertinent portions of the provisions published in the Federal Register are reproduced at Pet. App. 52a-55a.

[4] The reference to the suggested news release was not included in the Federal Register version of the publicity directive. The suggested news release itself is reproduced at Pet. App. 50a-51a. See also *Emergency Disaster Loan Ass'n, Inc.* v. *Block*, 653 F.2d 1267, 1272 (9th Cir. 1981) (Boochever, J., concurring, quoting Special Instruction 441.5).

agency offices on February 28, 1974, and was in turn "forwarded to the local media" (*id.* at 10a).[5] The press release, which was carried in at least two newspapers in the north Florida disaster area (see DX 11A and 11B, C.A. App. 48a, 49a), advised farmers that they could apply for emergency loans from FmHA under Pub. L. No. 93-237 if they suffered property or crop losses as a result of the April 1973 flooding, and that the application period would close on April 2, 1974. Only a handful of loan applications were received in this period. Pet. App. 24a.

2. Respondent Payne, a north Florida farmer, filed this action in the United States District Court for the Middle District of Florida on August 19, 1976. Although respondent Payne had received actual notice of the special 1974 emergency loan program, had applied for a loan, and had received one, he brought suit on behalf of a class of roughly 2500 farmers in the 13-county area covered by the May 26, 1973 disaster declaration who allegedly had been eligible for loans under the 1974 program. Contending that the class members had been denied property without due process by inadequacies in the publicity given to the special loan program, and that FmHA had violated its own regulations governing publicity, respondent sought entry of an injunction directing that the 1974 loan program be reopened. C.A. App. 56a-61a.[6]

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[5] The press release actually employed in Florida is reproduced at Pet. App. 57a-58a. It is identical to the release attached to Special Instruction 441.5.

[6] Respondent also sought damages for himself against the named defendants in their individual capacities (C.A. App. 61a-67a). The district court dismissed the damages claim. Respondent appealed, but his appeal was dismissed because no order had been entered under Fed. R. Civ. P. 54(b). Respondent did not cross-appeal when a final judgment was ultimately entered. The court of appeals accordingly did not pass on the damages claim. Pet. App. 6a n.7.



The district court certified a class consisting of all farmers in the 13-county area covered by the May 26, 1973 disaster declaration who suffered damages as a result of the natural disaster, were eligible to apply for emergency loans, and were not so notified (Pet. App. 44a). In an opinion issued on February 11, 1981, the court held that the publicity given to the emergency loan program in 1973-1974 by the responsible FmHA offices did not satisfy the requirements of general agency publicity regulations, including a directive to make "such public announcements as appear appropriate" (7 C.F.R. 1832.3(a)(1)(1973)). Pet. App. 42a-43a. Accordingly, the court enjoined FmHA to reopen the 1974 emergency loan program in the 1973 north Florida disaster area, directed the agency to give notice of the reopened program, and required it to process applications under the eligibility requirements prevailing in 1974 and to make loans upon the terms that were applicable in 1974 (*id.* at 43a-45a).[7]

3. a. On appeal, the government argued that by mandating reopening of the long closed 1974 emergency loan program, in disregard for the applicable deadline established by law, the district court had impermissibly estopped the United States from enforcing lawful conditions upon the receipt of public benefits, contrary to *Schweiker* v. *Hansen*, 450 U.S. 785 (1981), and *FCIC* v. *Merrill*, 332 U.S. 380 (1947). The government also argued that the pub-

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[7] The court of appeals stayed the judgment of the district court pending appeal (Pet. App. 13a).

licity given to the 1973 and 1974 emergency loan programs in north Florida met any judicially enforceable legal requirements.[8]

b. The court of appeals affirmed (Pet. App. 4a-29a). The court held that the publicity given to the special 1974 emergency loan program created by Pub L. No. 93-237 in the north Florida disaster area was inadequate. The court reasoned that the press release disseminated by the state and local FmHA offices "failed to 'inform the news media . . . of the *provisions* of P.L. 93-237' " (Pet. App. 25a (quoting 39 Fed. Reg. 7570 (1974); emphasis added by the court of appeals)) because it did not mention the reduced interest rate, the possibility of partial cancellation of the debt, or the waiver of any requirement that the unavailability of alternative sources of credit be demonstrated. The court thus concluded that the agency had failed to comply with its own publicity regulations governing the special 1974 emergency loan program (Pet. App. 25a, 27a n.35).[9]

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[8] In addition, the government argued that respondent Payne, who had actual notice of the special 1974 loan program and had in fact applied for and received a loan, lacked standing to complain that the program publicity was inadequate and was not a proper representative of a class seeking reopening of the loan program. The court of appeals granted a limited remand requested by respondent in this connection. See Pet. App. 13a n.19. On June 7, 1982, the district court entered an amended final judgment naming Carbie Ellie, a member of the class previously certified, as an additional representative plaintiff (*id.* at 46a-47a). The court of appeals concluded that these developments rendered the standing issue moot (*id.* at 13a n.19).

[9] Because of this holding, the court of appeals did not reach the question whether, as the district court had held, the publicity provided failed to satisfy other requirements of FmHA regulations, such as the requirement for "such public announcements as appear appropriate" (see page 7, *supra*). The court also declined to decide whether the latter requirement was too amorphous to be judicially enforceable. Pet. App. 25a.



The court of appeals also rejected the government's contention that the district court lacked authority to require reopening of the 1974 loan program (Pet. App. 14a-22a). Initially, the court of appeals held that Section 10(c) of Pub. L. No. 93-237 (see page 4, *supra*) did not establish a *statutory* deadline for the filing of applications under the special 1974 emergency loan program. The court of appeals held that the statute merely mandated a minimum extension of administratively set deadlines, to ensure that those deadlines did not expire before eligible farmers had an opportunity to apply for assistance. The court concluded that the Secretary had authority to prescribe filing deadlines and, in the circumstances presented, could extend, or could be ordered (under the Administrative Procedure Act) to extend, the deadline for the 1974 loan program beyond April 2, 1974. Pet. App. 16a-19a.

The court of appeals stated that it did not "condone the failure of potential loan applicants to follow legitimate time restrictions set as a prerequisite to applying for government benefits" (Pet. App. 18a). In the court's view, however, FmHA's failure to give the special 1974 emergency loan program fuller publicity created "exigent circumstances beyond the farmers' control [that] precluded intended beneficiaries from applying for loans," and justified the district court's order that the agency "extend the loan period" (*id.* at 18a, 19a). Citing *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954),

and *Morton* v. *Ruiz*, 415 U.S. 199 (1974), the court of appeals stated that reopening of the 1974 loan program was simply an application of the principle that agencies must abide by their own regulations (Pet. App. 19a, 21a-22a).

The court of appeals rejected the contention that *Schweiker* v. *Hansen*, *supra*, was controlling here (Pet. App. 19a-21a). The court's primary ground for distinguishing *Hansen* was that reopening the emergency loan program would "not threaten the public fisc" because "[l]oans * * * presumably are repaid" (Pet. App. 21a). The court also reasoned that this case involved "failure on the part of an entire agency to follow self-imposed regulations" (*id.* at 20a), rather than a negligent act of an individual government employee (*id.* at 19a-20a). Finally, the court of appeals remarked that "the error in *Hansen* was revocable," but that the agency omission in this case was not (*id.* at 20a-21a).

c. The court of appeals issued a brief supplemental opinion in response to the government's petition for rehearing (Pet. App. 30a-33a). The court stated that "while any language [in its opinion] categorizing" FmHA's publicity directive "as a regulation may have been overbroad," the result reached was correct because the courts are authorized to compel agencies to comply with their "internal administrative procedures" (*id.* at 32a).

4. The government then sought further review in this Court, suggesting disposition as appropriate in light of *Heckler* v. *Community Health Services*, No. 83-56, then pending. Following the Court's decision in *Community Health Services*, the Court granted the petition, vacated the court of appeals' judgment, and remanded the case for further consideration in



light of *Community Health Services*. *Block* v. *Payne*, No. 83-1691 (Oct. 1, 1984).

5. On remand, the court of appeals reinstated its prior decision (Pet. App. 1a-3a), suggesting that its judgment did not depend on application of equitable estoppel (*id.* at 2a; emphasis in original):

> We have considered the opinion of the Supreme Court [in *Community Health Services*] and conclude that it does not control the decision in the case *sub judice*. The liability of the United States Department of Agriculture in this case is based upon the failure of its agency, The Farmers Home Administration, to follow law enacted by Congress, and its own regulations. The plaintiffs did not seek relief based on reliance upon agency action that created an estoppel. The plaintiffs alleged and proved to the satisfaction of the district court that the agency *failed* to act in accordance with the law.

The court of appeals explained (*ibid.*) that its decision rested on the view that "government agents must be aware of the law and must obey it, just as private [parties] were required [to do] in [*Community Health Services*]."

## SUMMARY OF ARGUMENT

The court of appeals' decision requires the Secretary of Agriculture to reopen a multi-million dollar program of emergency loans designed by Congress to provide farmers with short-term financial relief from crop and property losses that were suffered more than a decade ago. In so holding, the court of appeals has barred enforcement of a published regulation, having the force and effect of law, that established April 2, 1974 as the deadline for filing applications for such

loans. This remedy constitutes an impermissible estoppel of the government. The court of appeals' continued refusal (Pet. App. 2a-3a), on remand from this Court for reconsideration in light of *Heckler* v. *Community Health Services*, No. 83-56 (May 21, 1984), to acknowledge the controlling effect of this Court's strictures against estopping the government is in error.

A. This Court has without exception refused to estop the government from enforcing valid statutory or regulatory conditions of eligibility for the receipt of public benefits. See, *e.g.*, *Heckler* v. *Community Health Services*, *supra*; *INS* v. *Miranda*, 459 U.S. 14 (1982); *Schweiker* v. *Hansen*, 450 U.S. 785 (1981). This rule serves the public interest by protecting the government in general and the public fisc in particular from the consequences of errors made by government employees and officials. "When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined." *Community Health Services*, slip op. 8.

B. The remedy ordered by the district court and affirmed by the court of appeals unquestionably estops the government. Under the decision below, the Secretary is required to process loan applications without regard to their untimeliness under the valid legal deadline of April 2, 1974. This relief possesses the classic identifying trademark of an estoppel: it "prevent[s] the one against whom it operates from pleading the truth," Restatement (Second) of Agency § 8B, comment a (1958)—here, that any loan applications now filed would be more than a decade out of time. Such a result is plainly foreclosed by this



Court's cases, which make clear that courts are not authorized "to overlook any * * * valid requirement for the receipt of [government] benefits." *Schweiker* v. *Hansen*, 450 U.S. at 790; see, *e.g.*, *INS* v. *Hibi*, 414 U.S. 5 (1973); *FCIC* v. *Merrill*, 332 U.S. 380 (1947). The reasons given by the court of appeals for distinguishing these cases are insubstantial.

The estoppel in this case implicates precisely the concerns on which the doctrine forbidding estoppel against the government is based. The remedy ordered below requires the expenditure of funds—including an outright grant of $5,000 to each qualifying applicant—in a manner not contemplated by Congress. The emergency loan program was designed only to tide farmers over the immediate shock of the 1973 disaster. Making funds available at this late date cannot possibly serve that purpose.

C. Even apart from the special concerns noted above, there is no basis on which to estop the government in this case because a private defendant would not be subject to estoppel in these circumstances. See *Heckler* v. *Community Health Services*, *supra*. Respondents could not reasonably have relied on any shortfall of information in FmHA's press release because the information provided was sufficient to alert them to the existence of the loan program and because full legal notice was provided in the Federal Register. There was in any event no violation of the publicity regulation because the press release fully comported with that directive.

D. The court of appeals erred by failing to heed these principles and relying instead on the Administrative Procedure Act and the concomitant obligation of agencies to abide by their own regulations. The relief ordered by the courts below—essentially a

thinly disguised form of damages—is not authorized by the APA. The requirement that agencies follow their own regulations cannot be manipulated, as it was here, to fashion a remedy that circumvents the strictures on equitable estoppel against enforcement of valid legal requirements. None of this Court's cases establishes that a regulation may be rendered a nullity as a sanction for an agency's violation of some other rule.

## ARGUMENT

### THE SECRETARY OF AGRICULTURE MAY NOT BE ESTOPPED FROM ENFORCING THE VALID LEGAL DEADLINE FOR FILING EMERGENCY LOAN APPLICATIONS

The court of appeals held that the Secretary of Agriculture must reopen a long-expired emergency loan program and process applications without regard to their untimeliness under a binding regulation. This result contravenes the well-established rule that the government may not be estopped in circumstances such as those presented here. It will require the government to provide substantial monetary windfalls to the respondent class in contravention of Congress's intent that program funds be expended solely to help farmers over the immediate emergency presented by the 1973 flooding.

#### A. The Government May Not Be Estopped From Enforcing Valid Legal Conditions On The Receipt Of Public Benefits.

Since its earliest cases, this Court has consistently and repeatedly held that the government may not be equitably estopped from enforcing the laws. See, *e.g.*, *Lee* v. *Munroe*, 11 U.S. (7 Cranch) 366 (1813); *Gibbons* v. *United States*, 75 U.S. (8 Wall.) 269, 274



(1868); *Hart* v. *United States*, 95 U.S. 316, 318-319 (1877); *Pine River Logging Co.* v. *United States*, 186 U.S. 279, 291 (1902); *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 408-409 (1917); *Sutton* v. *United States*, 256 U.S. 575, 579 (1921); *Utah* v. *United States*, 284 U.S. 534, 545-546 (1932); *Wilber National Bank* v. *United States*, 294 U.S. 120, 123-124 (1935); *United States* v. *Stewart*, 311 U.S. 60, 70 (1940); *FCIC* v. *Merrill*, 332 U.S. 380 (1947); *Automobile Club* v. *Commissioner*, 353 U.S. 180, 183 (1957); *Montana* v. *Kennedy*, 366 U.S. 308, 314-315 (1961); *INS* v. *Hibi*, 414 U.S. 5, 8 (1973); *Schweiker* v. *Hansen*, 450 U.S. 785 (1981); *INS* v. *Miranda*, 459 U.S. 14, 17-19 (1982); *Heckler* v. *Community Health Services*, No. 83-56 (May 21, 1984), slip op. 8. We are not aware of any decision of this Court holding that equitable estoppel lies against the government in any circumstance.[10]

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[10] In *Community Health Services*, the Court suggested (slip op. 8 n.12) that two of its cases "seem to rest" on the notion that the government may not enforce the law in certain circumstances as the result of misleading conduct. However, the Court in one of those cases, *Moser* v. *United States*, 341 U.S. 41 (1951), "expressly rejected any doctrine of estoppel." *Community Health Services*, slip op. 3 (Rehnquist, J., concurring in the judgment); see 341 U.S. at 47. Rather, the Court held in *Moser* only that the petitioner there had not knowingly and intentionally waived his right to citizenship, since he had not been advised that his conduct would result in such a waiver (*ibid.*). The other case cited by the Court in *Community Health Services*, *United States* v. *Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655 (1973), was a criminal prosecution. The Court's decision rested on the absence of fair warning that the conduct in question was proscribed. See *id.* at 674; *Community Health Services*, slip op. 3 (Rehnquist, J., concurring in the judgment). The doctrine that agencies may not in certain circumstances apply new rules retroactively,

The doctrine that the government may not be equitably estopped from enforcing the laws is grounded in reason and necessity and, ultimately, on sovereign immunity and the constitutional principle of separation of powers. The doctrine serves the public interest by protecting the government (and the public treasury) from the consequences of errors by its employees and officials, protection that is necessary if the Executive is to fulfill its constitutional responsibility of faithfully executing the duties assigned to it by Congress. Like the rules that the sovereign is exempt (except where Congress otherwise provides) from the consequences of its laches and from the operation of statutes of limitation, the doctrine that the government may not be equitably estopped "is supportable now because its benefit and advantage extend to every citizen, including the [party], whose plea * * * it precludes." *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 132 (1938); see also *Costello* v. *United States*, 365 U.S. 265, 281 (1961); *United States* v. *Hoar*, 26 F. Cas. 329, 330 (C.C.D. Mass. 1821) (No. 15373) (Story, Circuit Justice).

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also referred to by the Court in *Community Health Services* (slip op. 8 n.12), is not grounded on principles of equitable estoppel. Rather, it rests on constitutional due process concerns and the familiar requirements of administrative law that agencies must adequately explain their decisions and must act to further, rather than hinder, proper regulatory purposes. See *United States* v. *Caceres*, 440 U.S. 741, 752-753 & n.15 (1979); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 294-295 (1974); *Atchison, T. & S.F. Ry.* v. *Wichita Board of Trade*, 412 U.S. 800, 806-808 (1973) (plurality opinion); *SEC* v. *Chenery Corp.*, 332 U.S. 194, 202-204 (1947); see also *Automobile Club* v. *Commissioner*, 353 U.S. at 183-184 (refusing to forbid retroactive application of administrative ruling on basis of equitable estoppel).



If the judiciary were free to impose otherwise unauthorized liability on the government, based only on its own notions of equity, the mandates of Congress could easily be overriden. The effect of estopping the government is to raise employees and other representatives of the Executive Branch to the status of legislators by refusing to enforce valid legal rules on the basis of their conduct. Thus, "[w]hen the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined." *Community Health Services*, slip op. 8. Such a result is of special concern where, as here, the estoppel would expend itself on the public treasury in contravention of binding legal restrictions. See U.S. Const. Art. 1, § 9, Cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."); *Community Health Services*, slip op. 11 ("[p]rotection of the public fisc requires that those who seek[] public funds act with scrupulous regard for the requirements of law"); *Schweiker* v. *Hansen*, 450 U.S. at 788, quoting *FCIC* v. *Merrill*, 332 U.S. at 385 (courts must be careful " 'to observe the conditions defined by Congress for charging the public treasury' ").

### B. This Case Is Governed By This Court's Precedents Precluding Estoppel Of The Government Because The Court Of Appeals' Decision Bars The Secretary Of Agriculture From Enforcing The Emergency Loan Application Deadline.

#### 1. *The loan application deadline is a valid legal condition on the receipt of public benefits.*

The regulations that applied to the special 1974 emergency loan program for north Florida unambiguously provided: "[T]he termination date for ac-

ceptance of applications based on both physical and production losses will be April 2, 1974." 7 C.F.R. 1832.82(a) (1975) (Pet. App. 54a). Even assuming that Congress did not establish a statutory deadline for filing applications under the 1974 emergency loan program in Section 10(c) of Pub. L. No. 93-237 (see page 9, *supra*), there can be no doubt that the deadline reflected in the regulation has the force and effect of law.

Pursuant to Section 339 of the Consolidated Farm and Rural Development Act, 7 U.S.C. 1989, the Secretary of Agriculture is authorized "to make such rules and regulations [and to] prescribe the terms and conditions for making * * * loans * * * as he deems necessary" to carry out the agricultural loan programs under his supervision. Thus, the Secretary was vested with authority to adopt a deadline, having legislative effect, for filing of loan applications. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, No. 82-1005 (June 25, 1984), slip op. 5; *Batterton* v. *Francis*, 432 U.S. 416, 425 & n.9 (1977). The Secretary explicitly invoked this substantive rulemaking authority in promulgating the regulation that contains the April 2, 1974 deadline for filing loan applications. See 7 C.F.R. Pt. 1832, Subpt. E (1975) (Pet. App. 53a). Moreover, the deadline regulation was promulgated as a substantive rule in accordance with the requirements of the Administrative Procedure Act (APA).[11]

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[11] Pursuant to 5 U.S.C. 553(b)(B) and (d)(3), the agency dispensed with notice and comment and made the regulations immediately effective for good cause, explaining that such action was necessary to "implement[] the provisions of Public Law 93-237, and because a delay in implementing the provisions of the public law by this regulation would be contrary to the public interest." 39 Fed. Reg. 7569 (1974) (Pet. App. 52a).



The April 2, 1974 deadline for filing of emergency loan applications accordingly has "the substantive characteristics" and is the "product of [the] procedural requisites" that vest a regulation with the "force and effect of law." *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 301 (1979). Indeed, the court of appeals seemed to acknowledge as much, describing the deadline as a "legitimate time restriction[] set as a prerequisite to applying for governmental benefits" (Pet. App. 18a). The fact that the application deadline was established by regulation rather than by statute is therefore irrelevant, as this Court made clear in *Schweiker* v. *Hansen*, 450 U.S. at 790, where it similarly refused to estop the government from relying on a valid regulatory condition on eligibility for government benefits. See also *FCIC* v. *Merrill*, 332 U.S. at 384-385 (government not estopped from enforcing crop insurance regulations to any greater extent than it would be from enforcing underlying statute).

***2. The decision of the court of appeals impermissibly estops the government from enforcing the loan application deadline.***

a. The decision of the court of appeals requires the Secretary to reopen the 1974 emergency loan program and to accept applications without regard to their untimeliness under the established filing deadline on the ground that the agency failed adequately to publicize the details of the program. This is an estoppel plain and simple: under the decision below, "the Government is unable to enforce the law because

[of] the conduct of its agents." *Community Health Services*, slip op. 8. This Court has consistently recognized that its strictures against estoppel of the government are called into play whenever a private party seeks to prevent enforcement of a valid legal condition on receipt of government benefits. See, *e.g.*, *INS* v. *Miranda*, 459 U.S. at 15 (condition on granting of permanent resident status); *INS* v. *Hibi*, 414 U.S. at 8 (condition on naturalization); *FCIC* v. *Merrill*, 332 U.S. at 384-385 (condition on availability of crop insurance). As the Court emphasized in *Schweiker* v. *Hansen*, 450 U.S. at 790, courts are not authorized "to overlook any * * * valid requirement for the receipt of [government] benefits."

Equitable estoppel "works [in a] * * * peculiar procedural way * * * , that is, by preventing the one against whom it operates from pleading the truth." Restatement (Second) of Agency § 8B, comment a (1958). That is precisely the result of the court of appeals' decision, regardless of that court's stubborn refusal (Pet. App. 2a-3a) to recognize the applicable descriptive term and doctrine even after this Court remanded for further consideration in light of *Community Health Services*. The Secretary is foreclosed from raising the truth—that any loan applications to be filed by respondents would now be well over a decade out of time under a binding regulation having the force and effect of law. This is an estoppel.[12]

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[12] In its opinion on remand from this Court, the court of appeals appeared to suggest (Pet. App. 2a) that this case did not implicate estoppel principles because the government's violation consisted of a failure to act rather than an affirmative misrepresentation. This distinction is wholly without substance. See, *e.g.*, *Schweiker* v. *Hansen*, *supra* (government agent failed to advise claimant to file written application); *INS* v. *Hibi*, *supra* (government failed to publicize naturalization program); see also Restatement (Second) of Agency, *supra*, § 8B, comment c (estoppel may arise where person fails to act).



b. The application of estoppel under these circumstances implicates the very concerns on which the Court's doctrine precluding estoppel of the government is based. It prevents the government from enforcing the law and requires the expenditure of public funds in a manner not contemplated by Congress simply on the ground that FmHA failed to comply with another provision of law. The application deadline stated in categorical terms that "the termination date for acceptance of applications * * * *will be* April 2, 1974." 7 C.F.R. 1832.32(a) (1975) (Pet. App. 54a (emphasis added)). It was not made to depend on the quantum of publicity given to the loan program, nor was provision made in the regulations for waiver of the deadline for those persons who did not receive actual notice of the program.[13] Rather, the objective of the deadline set forth in the regulations was to ensure that the loans would be used only to satisfy the purpose for which they were intended: to tide farmers over from the immediate shock of the 1973 natural disaster, "in order that they may continue their future farming or livestock operations

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[13] It would, of course, have been a different matter had the application deadline been conditioned by Congress or the agency on compliance with the publicity directive. In that event, requiring the government to reopen the loan program on the basis of a finding that inadequate publicity had been circulated would not have entailed overriding the deadline, for the deadline by its own terms would have been extended. But that is not this case.

with credit from other sources." 7 C.F.R. 1832.81 (1975) (Pet. App. 53a). The loans were available only "to reimburse applicants for production expenses which went into damaged or destroyed crop and livestock," not for the purpose of "produc[ing] new crops" in succeeding years. 7 C.F.R. 1832.86(a), at 39 Fed. Reg. 7573 (1974).

There is no reason to believe that those persons who suffered losses in 1973 continue today to have unredressed needs from that time that could now be met by emergency assistance. Conversely, any need that might exist today in a particular case cannot realistically be traced to the 1973 north Florida flooding. The generous terms of the loans, including forgiveness of $5,000 of the debt and the 1% interest rate, will simply provide a substantial monetary windfall to those who obtain them, in contravention of Congress's purpose in establishing the emergency disaster loan program, a purpose that the application deadline was designed to achieve.

This windfall will impose a significant monetary burden on the government in contravention of the limitation lawfully imposed by the filing deadline, a result consistently prohibited by this Court. In fact, the forgiveness provision ensures that each "loan" will include an outright grant of $5,000. Extending such relief to the estimated 2500 members of the class certified in this case would cost the government $12.5 million in direct outlays; this cost will be greatly magnified if the unsuccessful intervenor in this case succeeds in extending the court of appeals' ruling to benefit a nationwide class in his separate action pending in the district court in Georgia (see page II, *supra*; Pet. App. 27a-29a & n.42). Moreover, the 1% interest rate constitutes a substantial subsidy in light



of prevailing market rates. Finally, there is in any event "no indication [in the Court's cases] that the Government would be estopped in the absence of [a] potential burden on the fisc." *INS* v. *Miranda*, 459 U.S. at 19; see also *INS* v. *Hibi*, *supra*; *Montana* v. *Kennedy*, *supra*.

***3. The court of appeals' decision conflicts with this Court's estoppel precedents.***

This Court has consistently held that the government cannot be estopped in circumstances similar to those presented here. In *INS* v. *Hibi*, *supra*, for example, Congress had established a program for naturalization of aliens who served in this country's armed forces during the Second World War and specified a deadline for filing naturalization petitions under the special program. 414 U.S. at 6-7. The Court refused to estop the government from "enforcing the cutoff date," which embodied "the public policy established by Congress" (*id.* at 8), on the ground that the government had not "fully publicize[d] the rights which Congress accorded under the Act" (*id.* at 8-9). The same result should pertain here.

Similarly, in *Schweiker* v. *Hansen*, *supra*, a Social Security Administration claims representative incorrectly informed a claimant that she could not qualify for benefits and failed, contrary to the agency's Claims Manual, to recommend that she nonetheless file a written application (450 U.S. at 786). Such an application was required under agency regulations promulgated pursuant to authority delegated by Congress (*id.* at 790). The Court refused to estop the agency from denying to the claimant benefits that she would have received had she been advised to make a

written application and filed one at the time of her interview with the claims representative, notwithstanding the representative's violation of the Claims Manual.[14]

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[14] The Court noted that the Claims Manual was an internal document without binding legal force, but that observation was made in the context of rejecting the contention that the claims representative's error amounted to "'affirmative misconduct'" (see 450 U.S. at 788-789). Cf. *INS* v. *Hibi*, 414 U.S. at 11 (Douglas, J., dissenting) (deliberate attempt to frustrate Congress's purpose could rise to level of affirmative misconduct). Here, the court of appeals expressly declined to rest its decision upon a finding of affirmative misconduct (Pet. App. 21a n.29), correctly recognizing that the case at most involved a failure to act, or "neglect" (*ibid.*; *id.* at 19a). Plainly, a mere failure to follow "affirmatively required procedure" (*ibid.*) is not the kind of misconduct that would "raise a serious question whether petitioner is estopped from insisting upon compliance with [a] valid regulation." *Schweiker* v. *Hansen*, 450 U.S. at 790; see also, *e.g.*, *INS* v. *Miranda*, 459 U.S. at 18 (negligence does not constitute affirmative misconduct); *INS* v. *Hibi*, 414 U.S. at 8-9 ("the failure to fully publicize the rights which Congress accorded" is not affirmative misconduct).

Although the question is not raised in this case, we note our view that there should be no affirmative misconduct exception to the doctrine that the government may not be equitably estopped. Barring the government from enforcing the law undermines the purposes behind the rule precluding estoppel whether a government representative's actions were merely negligent or rose to some unspecified higher level of affirmative misconduct. Moreover, it would be perverse to bar the government from enforcing the law only where its agents have acted in such a grossly improper fashion that their conduct could not conceivably have been within the scope of their authority. Finally, the standard has proven unworkable and has generated needless litigation in the lower courts because there is no generally accepted test for what constitutes affirmative misconduct. See generally *Schweiker* v. *Hansen*, 450 U.S. at 792 (Marshall, J., dissenting).



While the court of appeals appeared to recognize the relevance of *Hansen*, the flimsy bases on which it attempted to distinguish the case (Pet. App. 20a-21a) are completely meritless. The "most important difference" (*id.* at 21a) in its view—that the instant case involves no threat to the public fisc—has already been discussed (pages 22-23, *supra*). The court of appeals also reasoned that this case involves "failure on the part of an entire agency to follow self-imposed regulations" rather than negligence by a single employee, as in *Hansen* (Pet. App. 20a). But the rule against estoppel in government cases plainly is not limited to situations in which an individual employee acts in a manner that adversely affects the interests of an applicant for a benefit. For instance, the delay in processing a petition for adjustment of immigration status at issue in *INS* v. *Miranda*, *supra*, was not attributed to any employee's conduct, but was assessed on the premise that it was the act of the Immigration and Naturalization Service as a whole. 459 U.S. at 18 & n.3. Similarly, the suspension within the Philippines of the special overseas naturalization program in *INS* v. *Hibi*, *supra*, was ordered by the Attorney General, in consultation with the Commissioner of Immigration, and reflected the official policy of the United States. See 414 U.S. at 10-11 (Douglas, J., dissenting); see also *United States* v. *Mendoza*, 464 U.S. 154, 156 (1984). These cases make clear that the source of conduct alleged to give rise to an estoppel is not material (except perhaps as it might go to the presence of affirmative misconduct, which was not shown here, see page 24 note 14, *supra*). Given the important public interest in scrupulous observance of the law, the government cannot be equitably estopped from enforcing a valid law on the basis of a misstep

by several of its employees any more than by one of them.

The court of appeals also thought *Hansen* distinguishable on the ground that the erroneous advice of the claims representative there was "revocable"—*i.e.*, that action taken by the applicant for benefits was not irreversible. By contrast, the court reasoned, respondents could not now obtain loans under the 1974 emergency loan program because the application period has closed (Pet. App. 20a-21a). The court of appeals misapprehended the thrust of this Court's statement in *Hansen* (450 U.S. at 789) that the government employee's conduct there "did not cause respondent to take action, cf. *Federal Crop Insurance Corp* v. *Merrill*, *supra*, or fail to take action, cf. *Montana* v. *Kennedy*, *supra*, that respondent could not correct at any time." The Court could not have meant that the Social Security applicant's action in the wake of receiving erroneous advice had no irreversible impact upon her ability to receive benefits, for she did not receive all of the benefits that she might have absent the erroneous advice. 450 U.S. at 786-787. Thus, the Court's observation indicated only that the conduct of the government employee did not prevent the applicant from filing a written application had she desired to do so.

This case falls squarely under the rule applied by the Court in *Hansen*. The FmHA's failure adequately to publicize the terms of loans available under the special 1974 program did not prevent respondents from applying for loans,[15] and their eligibility for FmHA loans in time periods subsequent to April 2,

[15] Indeed, Ronald Payne, the original named representative of the respondent class, timely applied for and received a loan. See page 6, *supra*.



1974 was unaffected by the agency's conduct in 1974. The FmHA's action thus "did not cause respondent[s] to take action" or "fail to take action" that they "could not correct at any time" permitted by law. 450 U.S. at 789. In any event, it is not a requirement of the rule prohibiting estoppel that private action taken in the wake of an agency error be even partially reversible. See, *e.g.*, *Montana* v. *Kennedy*, *supra* (alien lost opportunity for citizenship); *FCIC* v. *Merrill*, *supra* (farmer lost opportunity to insure crops).[16]

### C. Even If The Government May Be Estopped In Some Circumstances, Estoppel Is Clearly Inappropriate In This Case Because Respondents Failed To Satisfy The Requirements For Estoppel Of A Private Party.

In *Heckler* v. *Community Health Services*, *supra*, the Court made clear (slip op. 9) that "however heavy the burden might be when an estoppel is asserted against the Government, the private party surely cannot prevail without at least demonstrating that the traditional elements of an estoppel are present." These elements include the claimant's "reasonable [detrimental] reliance" (*id.* at 14) on "'a definite misrepresentation of fact'" (*id.* at 7, quoting Restatement (Second) of Torts § 894(1) (1977)) or other misleading conduct by the party to be estopped. These prerequisites to application of equitable estoppel have not been satisfied in this case.

[16] The *Hansen* Court's citation (450 U.S. at 789) of *Kennedy* and *Merrill* indicates that it did not intend to modify the established doctrine, represented by those cases, that the government may not be estopped even when private action is irreversible.

1. Assuming for the moment that FmHA's press release violated the publicity undertaking in the agency's regulations, respondents could not reasonably have relied on the shortfall in information contained in the press release as a reason for not applying for a loan before the April 2, 1974 deadline. The flaw in the agency's performance identified by the court of appeals was simply the failure of the press release to specify all of the details of the emergency loan program. Pet. App. 25a. But it is undisputed that the press release disseminated to the media contained the critical information that a new program of emergency loans was available to persons who suffered crop losses in the April 1973 flooding in north Florida. See *id.* at 54a-55a. Plainly this information was sufficient to alert any farmer who might have been eligible and interested in securing a loan that the opportunity was at hand and that he should make an appropriate inquiry concerning the precise terms of the new loan program. See *Community Health Services*, slip op. 13; see also *Atkins* v. *Parker*, No. 83-1660 (June 4, 1985), slip op. 15.

In addition, the details of the loan program were accurately presented in their entirety in the Secretary's Federal Register notice. See Pet. App. 54a-55a. Publication in the Federal Register "is sufficient to give notice of the contents of the document to a person subject to or affected by it." 44 U.S.C. 1507. Respondents, like "[a]ll citizens[,] are presumptively charged with knowledge of the law." *Atkins* v. *Parker*, slip op. 14. And like the respondent in *Community Health Services*, they "should have been * * * acquainted" with "[t]he relevant * * * regulations" (slip op. 12-13). Respondents' reliance on their lack of actual awareness of the details of the special emergency loan program cannot be deemed reasonable



when they are at the same time charged by law with full knowledge of the program. See *ibid.*; see also *FCIC* v. *Merrill*, 332 U.S. at 384-385 (claimant could not estop government on basis of agent's misrepresentation of law where applicable regulations had been published in the Federal Register, "giv[ing] legal notice of their contents").

2. In any event, respondents failed to demonstrate that FmHA engaged in the sort of misleading conduct that could have given rise to an estoppel of a private party. The court of appeals' conclusion that the agency press release failed to satisfy FmHA's self-imposed obligation to "inform the news media * * * of the provisions of P.L. 93-237" (Pet. App. 54a; see *id.* at 24a-25a) is demonstrably erroneous.[17] In the first place, the court of appeals overlooked the fact that Pub. L. No. 93-237 covered a host of subjects unrelated to the 1974 loan program. The relevant provision, Section 4, simply revived, temporarily, a program that had previously been in effect in 1972. See page 4 & note 2, *supra*. Neither the interest rate applicable to that program nor the forgiveness provision is even mentioned in Pub. L. No. 93-237. In these circumstances, the press release, which mentioned the availability of a new loan program and the

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[17] The district court's finding of inadequate notice, unlike the court of apeals', did not rest on the regulation quoted in text, 7 C.F.R. 1832.82(a) (1975), but rather on 7 C.F.R. 1832.3(a)(1) (1973), which required that FmHA make "such public announcements as appear appropriate." See Pet. App. 23a-24a, 38a, 42a-43a. Accordingly, the government did not raise the argument that the press release comported with Section 1832.82(a) until its initial rehearing petition (at 14-15). In view of the court of appeals' departure from the district court's reasoning, the issue was adequately preserved below by raising it on rehearing.

pertinent deadline and advised interested persons as to how to secure more information, was entirely consistent with the publicity directive requiring that the local media be advised "of the provisions of P.L. 93-237."

Moreover, in determining whether an agency has violated its own regulations, substantial deference should be accorded to the agency's contemporaneous interpretation of the requirements in issue. See, *e.g.*, *United States* v. *Larionoff*, 431 U.S. 864, 872 (1977); *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965). In this case it is demonstrable, virtually to a certainty, that the agency's publicity directive was not intended to require that the details of the loan terms be disseminated through the media. As already discussed (pages 5-6 & note 5, *supra*), this directive was accompanied by a suggested news release, which was the very release actually employed in north Florida. The suggested release obviously reflected FmHA's contemporaneous understanding of the publicity requirement. The finding of agency noncompliance with its own regulations is thus completely insupportable. Commenting on essentially identical facts in *Emergency Disaster Loan Ass'n, Inc.* v. *Block*, 653 F.2d 1267 (9th Cir. 1981), Judge Boochever stated (*id.* at 1272 (concurring opinion)):

> While that release did not set forth some of the material provisions of the new law, it is not disputed that the state officials sent out news releases embodying the provisions of the suggested one. There was thus substantial compliance with the directive.

For these reasons, the agency neither misrepresented the extent of the publicity that it would give to the loan program nor violated its self-imposed duty to publicize the provisions of Pub. L. No. 93-237. Respondents have therefore failed to establish this prerequisite to application of the doctrine of equitable estoppel, in addition to their failure to demonstrate reasonable reliance.



**D. Barring The Secretary From Enforcing The Emergency Loan Application Deadline Is Not A Permissible Remedy For Violation Of FmHA's Publicity Directive.**

The court of appeals apparently viewed its decision as a routine exercise of judicial authority under the Administrative Procedure Act to require FmHA to abide by its own regulations. See Pet. App. 13a-14a n.20, 19a, 21a-22a & n.29. The court of appeals underscored this aspect of its reasoning in its supplemental opinion on denial of rehearing (*id.* at 31a). On remand from this Court, the court of appeals reinstated its earlier decision, concluding that *Community Health Services* is inapplicable because respondents here "did not seek relief based on reliance upon agency action that created an estoppel." Pet. App. 2a. The court of appeals' analysis is insupportable. As we have already shown (pages 19-23, *supra*), the relief awarded in this case is indistinguishable from an estoppel. Moreover, it finds no sanction in the APA or in the corollary doctrine that agencies are generally required to abide by their own regulations.

1. We note, initially, that this suit cannot be considered one for judicial review of final agency action pursuant to 5 U.S.C. 702 and 704. See *FTC* v. *Standard Oil Co.*, 449 U.S. 232 (1980). Respondent Payne sought and received a loan under the 1974 emergency loan program (see page 6, *supra*). With that single exception, there is no allegation that either the other

representative plaintiff or any other member of the class has ever applied—even tardily—to FmHA for a loan under the program here at issue. Nor has any respondent otherwise requested that the agency waive the April 2, 1974 loan application deadline. This is not a mere failure to exhaust rights of administrative appeal. Respondents simply have not at any point been subjected to reviewable agency action. See *Mathews* v. *Eldridge*, 424 U.S. 319, 328 (1976). As a result, there is no record on which the court of appeals could have determined the reasonableness of agency action. In these circumstances it is difficult, wholly apart from the estoppel question, to conclude that the relief awarded here is authorized by the APA. See generally *United States* v. *Caceres*, 440 U.S. 741, 754 (1979) ("[T]his is not an APA case, and the remedy sought is not invalidation of the agency action.").

2. In any event, the relief awarded in this case—whether labeled an estoppel or not—is not authorized by the APA. To reopen a long-expired emergency loan program, in the face of a valid regulation establishing a deadline for filing of applications, because of a finding of noncompliance with unrelated agency requirements covering the program is not to "compel agency action unlawfully withheld." 5 U.S.C. 706(1). Under that provision a court might well have enjoined FmHA to comply with its own publicity directive at a time when the loan program was still in operation. Cf. *Costle* v. *Pacific Legal Foundation*, 445 U.S. 198, 220 n.14 (1980) (aggrieved party may obtain relief from agency inaction under Section 706(1)); *Morris* v. *Gressette*, 432 U.S. 491, 514 (1977) (Marshall, J., dissenting) (Section 706(1) is "expressly designed" to remedy unlawful failures



to act). But the relief awarded here is not of that nature. Moreover, the Secretary's refusal to reopen the loan program is not agency action "unlawfully withheld": the court of appeals recognized that the application deadline, the basis on which the program has been closed, is a "legitimate time restriction[] set as a prerequisite to applying for governmental benefits." Pet. App. 18a.

Nor does reopening the loan program constitute "invalidation of agency action that is arbitrary, capricious, an abuse of discretion, * * * not in accordance with law * * * [or] taken 'without observance of procedure required by law.'" *United States* v. *Caceres*, 440 U.S. at 753-754 (footnote omitted), quoting 5 U.S.C. 706(2). Under Section 706(2), the court of appeals could have set aside the regulatory deadline had it not been properly promulgated. See, *e.g.*, *Motor Vehicle Manufacturers Ass'n* v. *State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 41 (1983). But the court of appeals did not rest its action on that ground, and in any event it is beyond question that the regulation establishing the April 2, 1974 filing deadline was lawfully promulgated under the APA (see pages 18-19 & note 11, *supra*).

The court of appeals may have believed that it would be arbitrary or an abuse of discretion for the Secretary not to waive the filing deadline in light of the failure to comply with the publicity regulation and that the court could accordingly direct him to do so.[18] For a number of reasons, this argument must

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[18] As already noted (pages 31-32, *supra*), the Secretary has not actually been given the opportunity to consider waiving the deadline because no member of the respondent class has even asked for such a waiver in connection with an actual application for benefits under the expired emergency loan program.

fail. In the first place, it is fundamentally at odds with *Schweiker* v. *Hansen*, *supra*, and *FCIC* v. *Merrill*, *supra*, both of which involved possibly waivable regulatory conditions on eligibility for government benefits. Applying the reasoning of the decision below, this Court should have held in *Hansen* that the Social Security Administration acted unreasonably in refusing to waive the written application requirement established by agency rules, in light of its employee's violation of the Claims Manual. And the Court should have held in *Merrill* that the Federal Crop Insurance Corporation was required to waive the provisions of its regulations precluding issuance of insurance upon crops planted on reseeded acreage, in light of its employee's failure to give correct advice. Of course, these were not the rulings of this Court. The strictures upon application of equitable estoppel of the government established by this Court's decisions cannot be circumvented by manipulating doctrinal labels in the fashion employed by the court of appeals: the mere fact that a requirement might be administratively waivable does not give the courts license to disregard it simply on the basis of a violation of another regulation.

This conclusion is reinforced by cases addressing the effect of limitations on the time within which suits may be brought against the federal government. This Court has consistently held that the courts are not authorized to extend or toll statutes of limitations for suits against the United States. See, *e.g.*, *United States* v. *Kubrick*, 444 U.S. 111, 117-118 (1979); *Soriano* v. *United States*, 352 U.S. 270, 276 (1957); see also *United States* v. *Locke*, No. 83-1394 (Apr. 1, 1985). Regardless of the circumstances under which filing deadlines may be waived by the



agency itself, principles of sovereign immunity forbid the courts from mandating such a waiver in the absence of express authorization that they may do so. Where, as here, the result of a judicially imposed waiver is in essence an award of damages against the United States, the APA does not provide that authorization. See 5 U.S.C. 702; see also *United States* v. *Testan*, 424 U.S. 392, 400 (1976).

Finally, even if the courts did have authority to review an administrative decision not to waive the filing deadline at issue here, that decision would not constitute an abuse of discretion. As we have discussed (pages 21-22, *supra*), the filing deadline was not dependent on compliance with the publicity directive and in fact served a purpose wholly unrelated to the publicity regulation, *i.e.*, preventing stale claims for funds that would not be used to assist farmers in meeting their immediate emergency needs caused by the natural disaster of 1973. A waiver of the deadline could not at this late date possibly further Congress's purpose in enacting the special emergency loan program but would only provide a windfall to farmers to use as they please.[19] Because giving full effect to the deadline, notwithstanding violation of the publicity directive, most sensibly furthers the statutory purpose, such action cannot be deemed arbitrary or an abuse of the agency's discretion. See generally, *e.g.*, *Capital Cities Cable, Inc.* v. *Crisp*, No. 82-1795 (June 18, 1984), slip op. 15 (deferring to agency's accommodation of statutory policies); *Heckler* v.

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[19] The fact that this action was not filed until August 1976, more than two years after the expiration of the loan program and more than three years after the April 1973 flooding, further suggests that respondents cannot reasonably be viewed as seeking assistance in tiding them over that emergency.

*Campbell*, 461 U.S. 458, 466 (1983) (deferring to agency's implementation of statutory provision); *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974), quoting *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1971) ("'[T]he ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.'").

3. The court of appeals purported to rely (Pet. App. 2a-3a, 21a & n.29) on the line of cases that mandates that agencies must abide by their own regulations. See, *e.g.*, *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260, 267 (1954); *Service* v. *Dulles*, 354 U.S. 363, 388 (1957); *Vitarelli* v. *Seaton*, 359 U.S. 535, 539-540 (1959); *Morton* v. *Ruiz*, 415 U.S. 199, 235 (1974). But cf. *American Farm Lines* v. *Black Ball Freight Service*, 397 U.S. 532, 538-539 (1970) (in the absence of substantial prejudice, agency has authority to depart from its procedural rules). The question in this case, however, is not whether FmHA could have been required to comply with its publicity regulation but rather the entirely distinct question of what type of relief is available in light of its failure to do so. None of the cited cases suggests that a court may invalidate one regulation in order to rectify a violation of another regulation. Indeed, this Court has made clear that a violation of agency regulations does not render all ensuing agency action a nullity. *United States* v. *Caceres*, *supra* (evidence secured in violation of agency regulations is not subject to exclusion in criminal prosecution).[20]

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[20] The court of appeals apparently believed that it could impose any remedy that it considered equitable once it was established that the agency had violated the publicity directive. It failed to recognize, however, that the case it cited (Pet. App. 21a & n.29) in support of its reasoning, *United States* v. *Heffner*, 420 F.2d 809 (4th Cir. 1970), which ordered the exclusion of evidence obtained in violation of an agency rule, is no longer good law in light of this Court's decision in *United States* v. *Caceres*, *supra*.



In most of the *Accardi* line of cases, an agency had sought to deprive a person of a benefit in a procedurally irregular manner. The relief in each of these cases was simply to set aside the agency's action, while permitting the agency to proceed on remand in compliance with its procedural rules. Thus, in *Accardi*, the Board of Immigration Appeals allegedly had failed to exercise its independent judgment in considering an alien's request for suspension of deportation; the Court ordered that, if this allegation could be substantiated, the alien was entitled to a new hearing before the Board. 347 U.S. at 268. In *Service* and *Vitarelli*, agencies had failed to follow their prescribed procedures for discharging employees. 354 U.S. at 388; 359 U.S. at 545, 546. In each of these cases, the procedural violation was directly related to the agency action that was set aside; in no case did the Court invalidate, as the court of appeals did here, an agency rule unrelated to the violation.

Similarly, in *Morton* v. *Ruiz*, *supra*, the agency had denied benefits to an otherwise qualified applicant on the basis of an eligibility condition that had been defectively promulgated because it was not published in the Federal Register as required by the APA and the agency's own rules. See 415 U.S. at 231-235. As the Court noted (*id.* at 232-233), the APA itself provides that regulations shall be unenforceable in such circumstances. See 5 U.S.C. 552(a)(1). Here,

by contrast, the regulation establishing the filing deadline was properly promulgated in accordance with the APA, and its validity was not conditioned on compliance with the publicity directive (see page 21, *supra*).[21]

Nothing in the Court's cases suggests that the sanction of unenforceability of one regulation is available merely to remedy the violation of a separate regulation. Such a result would make no sense in its own terms, and it would eviscerate the Court's doctrine precluding estoppel against the enforcement of valid conditions on eligibility for government benefits: any agency misstep could be characterized as a reason for holding a regulation invalid, which, of course, would be equivalent in these circumstances to estopping the government from enforcing it. Such a result would ill serve the public interest and would not sensibly encourage agencies to comply with their rules. Cf. *Caceres*, 440 U.S. at 755-756.

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[21] The Court stated in *Morton* v. *Ruiz* that "[b]efore [an agency] may extinguish the entitlement of these otherwise eligible beneficiaries, it must comply, at a minimum, with its own internal procedures." 415 U.S. at 235. The FmHA, however, did comply with all applicable requirements in establishing the April 2, 1974 deadline for filing emergency loan applications. Thus, unlike the eligibility rule that the Court refused to enforce in *Morton* v. *Ruiz*, the filing deadline was, as the court of appeals recognized (Pet. App. 18a), a "legitimate * * * restriction[] set as a prerequisite to applying for government benefits."



## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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# RESPONDENT'S

# BRIEF

No. 84-1948

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

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JOHN R. BLOCK, SECRETARY OF AGRICULTURE, *et al.*,
*Petitioners*

v.

RONALD E. PAYNE, *et al.*,
*Respondents*

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**On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

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## BRIEF FOR THE RESPONDENTS

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## QUESTION PRESENTED

The Respondents disagree with the question stated by the Petitioner. While equitable estoppel would be properly applied on the unique facts presented here, that doctrine was not the basis for the decision under review. Consideration of the applicability of equitable estoppel to government agencies is unnecessary to determine:

> Whether a court may remedy the "gross failure on the part of an entire agency" to comply with regulations requiring specific notice of benefits to citizens by compelling notice unlawfully withheld and affording an opportunity, following notice, for those objectively eligible to apply?

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## BRIEF FOR THE RESPONDENTS

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### STATUTES AND REGULATIONS INVOLVED

In addition to the regulations cited by the Petitioner, 7 C.F.R. 1832.3(a)(1)(1973) is set forth in the court of appeals' decision at Pet. App. 7a.

### STATEMENT

In April, 1973, heavy rains and flooding occurred in a thirteen county area of Northwest Florida.[1] Initial reports by the Farmers Home Administration (hereinafter FmHA) showed that more than 200,000 acres were flooded,[2] causing severe crop damage and erosion as a

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[1] Pet. App. 4a. Because the Petitioner's Brief omits any reference to the initial loan application period, these facts are set out here in some detail. Throughout this brief, references to the Appendix to the Petition for Certiorari will be "Pet. App. ——". References to the transcript of testimony will be "Tr. Vol. ——, p. —".

[2] Plaintiffs' Exhibit 7. Tr. Vol. 5, p. 66. The original exhibits remain in the court of appeals, and are not in the record transmitted

result of the "worst flood in 25 years."[3] Crop loss estimates ranged from twenty-five percent to ninety per cent of total crops.[4] The timing of the flood was particularly critical, as it occurred just after the spring planting season.[5]

Based on estimates by state and local FmHA officials, which showed projected agricultural losses in excess of three million eight hundred sixty-one thousand dollars ($3,861,000.00), the President declared the thirteen counties a major disaster area on May 26, 1973.[6]

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to this Court. References to Exhibits in this brief will identify them by number, and reflect the transcript page at which they were admitted.

[3] Plaintiffs' Exhibits 2, 3, 3a, 4, and 5. Tr. Vol. 5, p. 66.

[4] By FmHA estimates, over 3,900 farms out of a total 5,488 farms in the 7 counties initially reporting were affected. *Id.*

[5] Tr. Vol. 7, pp. 425-26. Jesse Wood, Jr., County FmHA Supervisor for Suwannee and Lafayette Counties, reported that "all crops in the area have been affected by excessive rain and many totally destroyed in areas flooded by [the] Suwannee River. Some farmers will not be able to return to their fields in time to plant crops this year. Unless they are assisted with emergency loans and are able to transfer operations to other land, they will be unable to continue farming operations." Plaintiffs' Exhibit 3. Tr. Vol. 5, p. 66. See also Tr. Vol. 8, pp. 476, 666-668.

[6] Pet. App. 5a. Although FmHA officials later revised the damage estimates downward, trial testimony established that severe crop loss and other damages from flooding did, in fact, occur. The named Plaintiffs testified that their farms, and those of their neighbors, suffered severe crop loss. See, e.g., testimony of Tommy Hart (Tr. Vol. 5, pp. 203-04); Carbie Ellie (Tr. Vol. 5, pp. 246-47); Payton Bembry, Jr. (Tr. Vol. 5, pp. 265-66); A.B. Tyre (Tr. Vol. 8, pp. 582-84); Alfred Welch (Tr. Vol. 7, pp. 475-76, 482, 504-05); Ronald Payne (Tr. Vol. 8, pp. 665-668). Ronald Payne testified that "several farmers" were forced off of their farms following crop losses sustained in the flooding. (Tr. Vol. 8, pp. 679, 718). The Agricultural Stabilization and Conservation Service, a sister agency to the FmHA made 310 cost sharing grants in a related program allowing farmers to fund "those measures needed to control severe wind erosion on farm lands or to rehabilitate farm lands damaged by . . .



**A. The Initial Loan Program.**

Pursuant to § 321(b) of the Consolidated Farm and Rural Development Act,[7] the FmHA was required to make emergency loans available in the areas designated. The FmHA established a nine month application period for loans related to crop loss, and a sixty day application period for loans related to property damage.[8] At the time of this declaration, the FmHA was authorized to charge interest on emergency loans at the rate of five (5%) per cent per annum.[9]

The FmHA's published regulations in effect during this initial loan application period [7 C.F.R. 1832.3(a)(1)(1973)] required FmHA officials to provide specific types of notice designed to inform eligible farmers of the availability of this benefit. The regulations provided, with regard to notice, that:

> [T]he State Director *will notify* the appropriate County Supervisors immediately and instruct them to

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disastrous floods . . . ." (Def. Ex. 20, Tr. Vol. 9, p. 858). The Small Business Administration emergency loan program for damage to homes within the disaster area generated 45 applications, and 24 loans, within two months. (Tr. Vol. 10, p. 1068).

[7] 7 U.S.C. § 1961 (1973) provides: "The Secretary shall make loans in any section designated . . . by the President pursuant to the provisions of the Disaster Relief Act of 1970, as amended, (1) to established farmers . . . who are citizens of the United States . . .: *Provided*, that they have experience and resources necessary to assure reasonable prospect for successful operation with the assistance of such loan, and are unable to obtain sufficient credit elsewhere to finance their actual needs at reasonable rates and terms . . . ."

[8] Pet. App. 35a.

[9] This interest rate was also available on "operating loans" provided by the FmHA on a non-emergency basis. The most significant distinction between operating loans and emergency loans, at this time, involved the re-payment period which, for operating loans, was normally one year while emergency loans could be amortized up to seven years. 7 C.F.R. 1832.10(a) (1973).

make EM loans available under § 1832.13 . . . . The State Director *will* also *notify* the U.S.D.A. Defense Board Chairman and *will* make such public announcements as appear appropriate.

(1) Immediately upon receiving notice about counties under his jurisdiction, the County Supervisor *will notify* the appropriate County U.S.D.A. Defense Board Chairman and make such public announcements as appear appropriate about the availability of EM loans under § 1832.13. Also, the County Supervisor *will explain* to other agricultural lenders in the area the assistance available under this program.[10] (Emphasis added.)

On June 4, 1973, a sample press release was forwarded to County FmHA Supervisors by the State Director, stating that applications should be submitted prior to July 30, 1973.[11] The nine month application period for crop losses was not mentioned in the press release.[12] The State Director made no other "public announcements." [13]

[10] The Petitioners' statement, at page 7 of their Brief, that the Regulations required FmHA's local offices "to make such public announcements as appear appropriate" only partially describes the notice required by this Regulation. Although the requirement of appropriate public announcements was a "key consideration", the FmHA's failure to comply with all aspects of the Regulation was the "crucial issue" in the trial court. Pet. App. 37a. The court of appeals concluded that violation of these specific notice requirements was not essential to the trial court's finding of failure to provide required notice, but affirmed the finding that the "FmHA failed to comply with federal regulations specifically designed to transmit notice of available emergency loan programs to the *public*." Pet. App. 24a. (emphasis by the court).

[11] Pet. App. 38a.

[12] This omission is significant because those farmers who might suffer crop losses would not be able to determine the extent of those losses until August or later, depending on harvest time. Tr. Vol. 7, pp. 425-26.

[13] Pet. App. 38a-39a. The paucity of the FmHA's efforts to provide "such public announcements as appear appropriate" is in stark contrast to the notice provided by its sister agencies in this



The press release was received by the FmHA County Supervisors and routinely forwarded to the local media.[14] No effort was made to determine if, in fact, the press release was published.[15] The FmHA violated regulations requiring both the State Director and the County Supervisors to "notify the [State and] County U.S.D.A. Defense Board Chairman . . ." and "other agricultural lenders" [16] of the availability of the emergency loan program.

In early June, 1973, the President's Office of Emergency Preparedness conducted a one week public meeting at Live Oak, Florida to explain to the public the types of disaster relief available to affected persons. This meeting was well attended by local farmers.[17] Although the FmHA set up a table, it was manned by a FmHA representative only for a short period of time. The majority of the time that it was manned was by a volunteer, not employed by the FmHA, who was without knowledge of, or familiarity with, FmHA programs generally or this emergency loan program specifically.[18]

disaster. Pet. App. 25a-26a. The trial court determined that the FmHA violated its obligations under this regulation as a matter of law. Pet. App. 43a.

[14] Pet. App. 39a. See also Tr. Vol. 6, pp. 304, 305; Vol. 9, pp. 941, 942.

[15] Pet. App. 39a. The FmHA obtained some publicity through the efforts of other agencies. The Defendants' efforts to "make such public announcements as appear appropriate" through the use of press releases or other media contacts were largely unsuccessful.

[16] Pe[illegible] App. 42a.

[17] *Id.* Testimony of A.B. Tyre, Tr. Vol. 8, pp. 584-89; testimony of Ronald Payne, Tr. Vol. 8, pp. 764-65; testimony of Tommy Hart, Tr. Vol. 5, p. 208; and testimony of Clyde King, Tr. Vol. 5, p. 455.

[18] Pet. App. 37a, 38a. Albert Stevens, Director of farmer programs for the FmHA, recalls attending this meeting. He "made a presentation, but [did not] remember . . . whether it was on the new youth program or the emergency program." Tr. Vol. 5, pp. 138-39. See generally, testimony of Jesse Wood, Jr., County FmHA Supervisor, Tr. Vol. 9, pp. 990-93.

Several Plaintiffs, and many other farmers, attended this meeting. Tommy Hart,[19] Ray Burnett,[20] Payton Bembry, Jr.,[21] A.B. Tyre,[22] and J.T. Payne attended for the purpose of determining if relief was available for farmers who had suffered crop losses. They were told "if you are a farmer, you don't qualify. This isn't for farmers." [23] This was, in fact, not true and FmHA officials were aware that this misinformation was given to, and believed by, many farmers.[24] The FmHA took no action to correct this erroneous information following the Live Oak meeting.[25]

The FmHA had actual knowledge that farmers had suffered losses as a result of the flooding. Plaintiffs, Carbie Ellie and Tommy Hart, existing FmHA borrowers, were identified by name in the FmHA's original damage reports.[26] Ellie testified that he went to the County FmHA office twice a week and that the FmHA County Supervisor visited his farm and witnessed the crop damage.[27] Ronald Payne told a County FmHA Supervisor that his crop losses would preclude a continued op-

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[19] Tr. Vol. 5, pp. 206, 207.

[20] Tr. Vol. 5, p. 228.

[21] Tr. Vol. 5, pp. 267, 268.

[22] Tr. Vol. 8, p. 588.

[23] Tr. Vol. 8, p. 589; see also Tr. Vol. 5, pp. 228, 267-268; Vol. 8, p. 615. Pet. App. 37a-38a.

[24] *Id.*, see also Tr. Vol. 9, pp. 989-995.

[25] The testimony indicated that a "sign up sheet" could have been used to contact those farmers who had been told that no loan benefits were available. It was not, even when more attractive benefits later became available, Tr. Vol. 9, p. 1023; Vol. 10, pp. 1077-78.

[26] Plaintiffs' Exhibit 7. Tr. Vol. 5, p. 66.

[27] Tr. Vol. 5, pp. 249-50. Jesse Wood, County Supervisor confirmed that he had visited Mr. Ellie's farm. Tr. Vol. 9, p. 995. He also knew that other farmers had "likely" suffered damage. Tr. Vol. 9, pp. 1044-45.



eration of his farm, and repeatedly asked for a disaster loan.[28]

During the first application period, no applications for emergency loans were received by the FmHA, and no loans were made. The FmHA State Director was "flabbergasted" at the lack of response to the loan program.[29] Many FmHA County Supervisors testified that farmers were "switched" from emergency loans to operating loans during this application period.[30]

**B. The 1974 modification of the Emergency Loan Program.**

Prior to this disaster, the then Secretary of Agriculture, Earl Butz, had refused to make loans available contrary to 7 U.S.C. § 1961. This refusal by the FmHA to implement the congressional emergency loan program was accomplished by "administrative fiat" in order to meet executive budgetary goals. The then Secretary simply withheld funds for programs which he deemed "least essential" based on his "subjective judgment." [31]

Following the Secretary's executive curtailment of agricultural loan benefits, Congress enacted Public Law 93-237, 87 Stat. 1024 (1973). This congressional extension of disaster loan benefits was enacted because of Congress' "concern that administratively set deadlines may expire, thus precluding . . . farmers . . . from applying

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[28] Tr. Vol. 8, pp. 684-686. Defendant, Taylor, told Ronald Payne, "there is no such thing" as an emergency loan.

[29] Pet. App. 39a.

[30] Pet. App. 41a. Tr. Vol. 5, p. 175; Vol. 6, p. 309; Vol. 7, pp. 391, 446; Vol. 9, pp. 896, 946, 1033. The "substitution" of operating loans for emergency loans by FmHA County Supervisors was detrimental in two respects. First, operating loans had to be repaid in one year, as contrasted to seven. More importantly, had emergency loans been made to qualified farmers, they would have received letter notice of the more advantageous provisions of Pub.L. No. 93-237. See 7 C.F.R. 1832.84(d) and (e) (1974).

[31] Pet. App. 11a-12a.

for benefits . . . ." [32] For this reason, Congress required that the FmHA extend the period for applications for loan benefits arising from disasters occurring after December 27, 1972.[33]

The FmHA itself concluded that "a delay in implementing the provisions of [P.L. 93-237] would be contrary to the public interest." [34] Yet it withheld any notification of the congressionally mandated extension of benefits until February 28, 1974, when almost sixty days of the ninety day extended application period had already passed.[35]

On February 27, 1974, the FmHA published an amendment to 7 C.F.R. 1832 which commemorated the change contained in Public Law 93-237 with regard to the reduced interest rate, the $5,000 "forgiveness" feature, and the removal of the nonavailability of other credit requirement. The amended regulations established an application period through April 2, 1974, and required that State and County FmHA officials "inform the news media in-

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[32] Pet. App. 17a. Conf. Rep. No. 93-363, 93rd Cong., 1st Sess. 2, *reprinted in* 1973 U.S. Code Cong. & Ad. News 3342, 3343.

[33] Throughout its brief, the Petitioner continues to equate this congressionally mandated extension of the right to apply for loan benefits with a congressional mandated termination of those benefits. This incorrect characterization "overlooks the context in which [Public Law 93-237] was passed." Pet. App. 18a.

[34] 39 Fed. Reg. 7569 (1974).

[35] Pet. App. 41a. Mr. Taylor, a County Supervisor for three of the 13 counties affected by the disaster, testified that his first knowledge of the extended application period came from a prospective borrower, Ronald Payne. *Id.* Pub. L. 93-237 made the relief available for farmers more attractive, providing that qualifying farmers who had suffered crop and property losses were eligible for loans at a maximum interest rate of 1%, as contrasted to the previous 5% interest rate and were entitled to a $5,000.00 "forgiveness" feature. The amendment also eliminated the requirement that loan applicants be "unable to obtain sufficient credit elsewhere to finance their actual needs of reasonable rates and returns." Pet. App. 9a.



cluding newspapers, radio and television in the affected counties of the provisions of P.L. 93-237." [36]

This amended regulation also required that the County Supervisors "prepare a list of indebted and paid up borrowers who received EM loans as a result of the disasters in his county." The County Supervisor was then to mail individual letter notices of the new application period.[37] Since no emergency loan applications were filed during the first application period, these letters were provided to the County Supervisors but sent to no one.[38]

The State and County FmHA officials, in response to the reopened application period for this disaster, took absolutely no steps to inform eligible farmers of the existence of the favorable terms contained in Public Law 93-237, except that on February 28, 1974, some thirty-two days before the administratively established application deadline, the State Director issued a sample press release to all County Supervisors.[39] This release stated that loan applications would be taken under the terms of a new law, but the press release did not recite the critically important "provisions of PL 93-237" concerning the $5,000 "forgiveness", the 1% rate of interest, or the critical change with regard to the removal of the requirement that the availability of other credit no longer precluded participation in the loan program.[40]

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[36] Pet. App. 54a.

[37] 7 C.F.R. 1832.84(d) and (e) (1974).

[38] Tr. Vol. 5, p. 144. No effort was made to mail the letters to those farmers who, although qualified for emergency loans earlier, had been "switched" to operating loans. No effort was made to mail the letters to farmers who had signed up at the Live Oak meeting, and had been told that no agricultural loans were available. Pet. App. 26a. The FmHA continued to send routine mailings to its client/farmers, but did not include any notification in these mailings. See Tr. Vol. 8, pp. 719-20; Vol. 8, pp. 837-38; Vol. 9, pp. 1040-41.

[39] Pet. App. 40a, 51a.

[40] *Id.*

Once again, the press release was routinely forwarded to media, but received little publication.[41] No other efforts at notification were undertaken. Specifically, there was no notification of the county governing body; no notification of other agricultural lenders; and no notification of the U.S.D.A. Defense Board Chairmen. Compare 7 C.F.R. 1832.3(a)(2), (Pet. App. 35a-6a).

No efforts were made to contact farmers who had inquired about, or may have needed, an emergency loan, nor was there any effort to contact borrowers who had inquired about emergency loans and were "switched" to operating loans at now considerably less advantageous terms and rates.[42]

During both first and second application periods, FmHA County Supervisors sent routine mailings to farmers who had existing loans. No notice of the availability of emergency loans was included.[43]

Further, the FmHA was aware that a "sign in sheet" had been maintained at the Live Oak meeting,[44] and was aware of the widespread, albeit erroneous, belief that no disaster relief was available for farmers. Even when notified of the $5,000 "forgiveness" and 1% interest features available under Public law 93-237, no effort was made by the FmHA to notify those farmers who had "signed up" at Live Oak.[45]

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[41] Two newspaper articles were published during the second application period, neither of which contained the critical information concerning "the provisions of Public Law 93-237." 7 C.F.R. 1832.82(a) (1974).

[42] Pet. App. 40a, 41a.

[43] See testimony of Ron Whitfield, Tr. Vol. 9, pp. 943-945; Jesse Wood, Tr. Vol. 9, pp. 1040, 1041; James Wilkinson, Tr. Vol. 8, pp. 719-20, 837, 838.

[44] Testimony of Jesse Wood, Tr. Vol. 9, pp. 1023-24.

[45] *Id.* Pet. App. 26a.



The Agriculture Soil and Conservation Service (ASCS) had an efficient on-going system of maintaining continuous contact, by monthly mailings of bulletins, newsletters and other information, to farmers and residents in the involved areas. The ASCS would have willingly included information concerning the availability and terms of the FmHA loan program had it been requested to do so. Neither the State nor the County FmHA officials ever made any inquiry to the ASCS about such a procedure.[46] Nor were any signs or information sheets containing the terms and conditions of this particular emergency loan program available at FmHA offices.[47]

Four loans were granted by the FmHA for this disaster.[48] Three loans were the direct result of Ronald Payne's insistence to affected farmers that emergency relief was, in fact, available.[49] Mr. Payne attempted to notify other farmers, but they did not believe that assistance was available, "because [they] didn't hear it from other sources." [50]

Ronald Payne,[51] a farmer eligible for loan benefits under the May, 1973 disaster declaration, filed a class

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[46] See, e.g., testimony of Frank Pope, then State Director of ASCS, Tr. Vol. 9, p. 883; testimony of Jesse Wood, Tr. Vol. 9, p. 1040; testimony of James Wilkinson, Tr. Vol. 8, p. 837.

[47] Pet. App. 41a.

[48] Pet. App. 36a.

[49] Testimony of Ronald Payne, Tr. Vol. 8, pp. 762-65. The fourth loan to "Red" Walker resulted from Mr. Walker's receipt of Sen. Gurney's "Dear Friend" letter, Tr. Vol. 8, p. 763. Ronald Payne received an emergency loan of $70,000.00.

[50] Tr. Vol. 8, pp. 709, 710.

[51] Both prior to and during the trial, Plaintiffs requested leave to join additional partys plaintiff "to make sure we don't have a standing problem with . . . an individual who did receive a loan . . . ." Tr. Vol. 8, pp. 773-74. That motion was orally granted

action lawsuit in August, 1976 contending that the FmHA had failed to provide minimally adequate notice of loan benefits, as required by FmHA regulations and the Due Process clause of the United States Constitution.[52] The trial court found a violation of binding federal regulations which required "specific types of notice which were not effectuated." [53] Because the FmHA's violation of binding regulations prejudiced farmers who did not apply for benefits for which they were otherwise objectively eligible, the trial court found that mandatory injunctive relief was appropriate. The trial court required that notice be afforded, as required by the regulations, prior to administrative termination of the application period.

The trial court specifically did not reach the issue of eligibility for benefits, finding it "within the province of the FmHA to process all applications and apply the eligibility requirements of 7 C.F.R. § 1832 . . . ." [54]

The court of appeals affirmed, finding that the "liability of the [FmHA] is grounded in Congress' enactment of legislation directing the [agency] to implement the terms of the legislation, the agency's passage of implementing regulations, and the agency's failure to follow the resulting affirmatively required procedure." [55] Because of this "gross failure on the part of an entire agency to follow self-imposed regulations prescribing

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by the trial court (Tr. Vol. 10, p. 1203) and Plaintiff, Carbie Ellie, was added as a second named Plaintiff. (Record Supp. Volume, pp. 4-5). The Petitioner does not assert any lack of standing as to the Plaintiff, Ellie, who neither received notice of, nor applied for, a loan.

[52] Neither the trial court nor the court of appeals reached the constitutional question (Pet. App. 27a, n.35, Pet. App. 43a).

[53] Pet. App. 42a.

[54] Pet. App. 43a.

[55] Pet. App. 19a.



adequate notice to potential applicants," [56] the court reasoned that mandatory injunctive relief under 5 U.S.C. § 706, to compel agency action, i.e. notice, which had been unlawfully withheld or unreasonably delayed, was available and that, without such notice, the enforcement of the administratively set deadline would be agency action taken "without observance of the procedure required by law." [57]

## SUMMARY OF ARGUMENT

Congress has, for many years, authorized statutory benefits, in the form of low interest loans and grants, to farmers who suffer crop loss and property damage from disasters. Funding for these benefits has been maintained on a continuing basis. The FmHA is charged with implementing this benefit program.

These farmers were objectively eligible for loan benefits as a result of a major disaster. The FmHA violated the law by failing to provide notice of available benefits to the public as required by regulations, and by agency wide misstatements that no benefits were available. Because of these agency violations of law, virtually no farmers applied for, or received, the benefits which Congress intended for them to receive. Although funding for these benefits continues to be available, the FmHA argues that once its administratively set deadline passes, a federal court is powerless to redress the agency's violations of law.

The Administrative Procedure Act specifically empowers a federal court to grant the limited relief afforded below, separate and apart from any consideration of the applicability of estoppel to agency misconduct. FmHA

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[56] Pet. App. 20a.

[57] Pet. App. 14a.

regulations, requiring specific types of notice to eligible farmers, have the force and effect of law, and were binding on the agency. Where that notice was withheld by the agency in violation of the regulations, the court could require that notice to be afforded.

In the absence of agency compliance with regulations requiring notice, administrative termination of the right to apply is agency action taken "without observance of the procedure required by law." Since it is within the province of the agency and the court to relax or modify procedural rules when the ends of justice require it, the court of appeals correctly prevented administrative termination of the right to apply, until notice of the opportunity to apply was afforded.

Where agency inaction, in violation of regulations, results in a negation of congressional intent that statutory benefits be made available, a court may properly require that the agency afford the right to apply by extending administrative deadlines. This is especially true where the result furthers, rather than expands, the congressional benefit scheme and observes all valid restrictions on the expenditure of government funds.

Although unnecessary to a decision in this case, estoppel may properly be applied in an action seeking equitable relief under the Administrative Procedure Act where affirmative misconduct in the form of both agency wide violations of binding regulations and affirmative misrepresentations of the availability of statutory benefits to objectively eligible beneficiaries would otherwise frustrate the congressional purpose of a statutory benefit scheme. To allow administrative termination of the right to apply for benefits, where the agency has failed to provide the notice of those benefits as required by regulations, would deprive these farmers of Due Process.



## ARGUMENT

### I. WHERE CONGRESSIONAL INTENT TO PROVIDE BENEFITS TO OBJECTIVELY ELIGIBLE FARMERS IS FRUSTRATED BY THE "GROSS FAILURE OF AN ENTIRE AGENCY" TO PROVIDE SPECIFIC NOTICE OF THOSE BENEFITS IN VIOLATION OF ITS OWN REGULATIONS, A COURT MAY COMPEL SUCH NOTICE AND PREVENT APPLICATION OF AN ADMINISTRATIVE DEADLINE UNTIL THE AGENCY OBSERVES THE "PROCEDURE REQUIRED BY LAW," UNDER 5 U.S.C. § 706.

These farmers were, and are, objectively eligible for statutory benefits which continue to be funded by Congress on an ongoing basis. The Petitioner argues that a federal court is powerless to redress unlawful administrative action which denied notice required by binding regulations, and which resulted in negation of the congressional intent that benefits be made available, because the administrative deadline for applications expired.

Although estoppel would be appropriately applied on the unique facts presented here,[58] neither the lower courts nor this Court need reach that issue, as the Administrative Procedure Act, 5 U.S.C. § 706 specifically authorizes the limited relief afforded below. The FmHA was properly compelled to provide agency action unlawfully withheld (notice) before it administratively terminates the right to apply for benefits which remain available.

The Petitioner concedes[59] that the court below would be empowered to compel agency compliance with its regulations "at a time when the loan program was still in operation."[60] Apparently, it contends that the loan pro-

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[58] See part II, pp. 23-28, *infra*.

[59] Pet. Brief at 32, citing *Castle v. Pacific Legal Foundation*, 445 U.S. 198 (1980) and *Morris v. Gressette*, 432 U.S. 491, 514 (1977) (Marshall, J. dissenting).

[60] The emergency loan program continues. The government has never contended, and does not contend in this court, that the funds

gram ceased operation upon the administratively set deadline,[61] thereby terminating any judicial review of, or redress for, agency violation of regulations prior to that date. This view is inconsistent with the long standing and strong presumption that action taken by a federal agency is reviewable by the Federal Courts. *Dunlop v. Bachowski*, 421 U.S. 560 (1975), *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).[62]

The result below is fully consistent with this Court's repeated commands that courts enforce "any . . . *valid* requirements for the receipt of government benefits." *Schweiker v. Hansen*, 450 U.S. 785, 790 (1981) [emphasis added], *FCIC v. Merrill*, 332 U.S. 380 (1947). Here, unlike *Merrill* and *Heckler v. Community Health Services*, No. 83-56 (May 21, 1984), the court has specifically

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are no longer available or have been statutorily terminated. (See Pet. App. 14a, 15a, n.22). It is only the administratively set deadline for applications from this disaster which has expired. Compare *Schweiker v. Hansen*, 450 U.S. 785 (1981) (statute limited retroactive benefits to 12 months prior to application).

[61] Because funding continues to be available, the need to "protect the government and its treasury from the consequences of errors by its employees", is not applicable. The relief affords, rather than inhibits, "the protection necessary [for] the executive . . . to fulfill its constitutional responsibility to faithfully execute the duties assigned to it by congress." Pet. brief at 16.

[62] Apparently, the Petitioner argues that judicial review may be precluded by the agency deadline, unless the farmers disbelieve the agency wide statements that there are no loans for which to apply, assume that the agency has violated its regulations requiring notice, and file an application with County FmHA officials, then file an action in Federal Court, all within the 30 days between the FmHA's adoption of implementing regulations and its administratively set deadline. (Pet. Brief at pp. 31, 32). The administrative deadline is not jurisdictional, and failure to apply does not preclude judicial review under the Administrative Procedure Act. *Health Systems Agency of Oklahoma Inc. v. Norman*, 589 F.2d 486 (10th Cir. 1978).



limited the relief to provide only that those objectively eligible have the right to apply for benefits to which they were entitled but for their failure to apply.[63]

The relief afforded here does not require the expenditure of funds "in a manner not contemplated by congress." [64] Congress clearly contemplated that loan benefits would be received after the fact, as reimbursement for funds already expended, or losses sustained.[65] In fact, Congress itself has shown its willingness to extend the application period where necessary to allow citizens to obtain benefits after they suffer losses, where confusion may have prevented application by those eligible. [pp. 7-8, n. 32, *supra*]

Nor does the result below create a "windfall" allowing eligible "farmers [to] use the funds as they please." [66] The district court required only that the FmHA receive and process applications for loans which would then be subject to the limitations imposed by statute and regulations.[67]

The FmHA was specifically authorized, pursuant to § 339 of the Consolidated Farm and Rural Development

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[63] Pet. App. 43a-44a. The District Court specifically did not reach the question of eligibility, nor did it mandate the expenditure of any funds, correctly holding that the agency should process application and determine eligibility based upon its own valid regulations.

[64] Pet. brief at 21. Unlike *Schweiker v. Hansen*, *supra*, there is no statutory time limit applicable to these benefits.

[65] 7 C.F.R. 1832.81 (1974) provides, "the basic objective of EM loans is to indemnify eligible farmers . . . for losses resulting from designated disasters in order that they may continue their future farming . . . operations . . . ."

[66] Pet. brief at 22.

[67] 7 U.S.C. § 1961 allows emergency loans to be used "for any of the purposes authorized under sub-chapter 1 [7 U.S.C. § 1923] or 2 [7 U.S.C. § 1942] of this chapter." These purposes include the acquisition or improvement of farms and buildings, the purchase of livestock, poultry, farm equipment, feed, seed, fertilizer and farm supplies or to "meet other essential farm operation expenses."

Act, 7 U.S.C. § 1989, to adopt regulations having legislative effect. See, e.g., *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, No. 82-1005 (June 25, 1984), slip op. 5; *Batterton v. Francis*, 432 U.S. 416, 425 & n.9 (1977). The Secretary explicitly invoked his substantive rule making authority in promulgating the regulations which required the FmHA to notify county supervisors, USDA Defense Board Chairmen and other agricultural lenders of the assistance available to farmers under the loan benefit program.[68] This same substantive rule making authority was invoked to require that the FmHA notify county commissions of the availability of loan benefits,[69] and to inform the news media of the provisions of Public Law 93-237.[70]

All of these regulations, requiring specific types of notice be afforded so that farmers could apply prior to the administratively set deadline, had the "substantive characteristics," and were the "product of [the] procedural requisites," that vest a regulation with the "force and effect of law." *Chrysler Corporation v. Brown*, 441 U.S. 281, 301 (1979).

These regulations, being an exercise of delegated lawmaking authority from Congress, "must be taken by those entitled to rely upon them as what they purport to be—an exercise of delegated legislative power—which,

[68] 7 C.F.R. 1832.3(a)(1) (1973).

[69] 38 Fed. Reg. 20244 (1973).

[70] 39 Fed. Reg. 7570 (1974). Unlike the Petitioner (Pet. Brief at 28), we do not read this Court's opinions in *Atkins v. Parker*, No. 83-1660 (June 4, 1985), and *Heckler v. Community Health Services*, No. 83-56 (May 21, 1984) to hold that publication of a regulation in the Federal Register relieves an agency from complying with other, binding regulations requiring that specific notice be provided. Compare *Vitarelli v. Seaton*, 359 U.S. 535 (1959). Publication of the regulations in the Federal Register would be of little help to farmers like the Plaintiff, Ellie, who cannot read (Tr. Vol. 5, pp. 256-57), and rely upon FmHA County officials and other sources for information concerning FmHA programs.



until amended, are controlling alike upon the [agency] and all others whose rights may be affected by the [agency's] execution of them." *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407, 422 (1942). "So long as this regulation remains in force, the Executive Branch is bound by it, and indeed the United States as the sovereign composed of the three branches is bound to respect and enforce it." *United States v. Nixon*, 418 U.S. 683, 696 (1974).[71]

The trial court was presented with substantially undisputed evidence demonstrating a "gross failure on the part of an entire agency to follow . . . regulations prescribing adequate notice to potential beneficiaries."[72] The petitioners argue that their failure to follow binding regulations is not redressable under the Administrative Procedure Act because the persons eligible to receive these benefits, who did not apply for them prior to the administratively established deadline, "simply have not at any point been subjected to reviewable agency action."[73]

Plaintiffs' claims in this case specifically sought judicial relief under the Administrative Procedure Act, 5 U.S.C. §§ 701-706.[74] The Administrative Procedure Act

[71] The Petitioner asserts, contrary to the court of appeals' conclusion, that the district court's factual determination that the FmHA failed to "inform the news media . . . of the provisions of P.L. 93-237" is erroneous (Pet. Brief at 29), but does not challenge the trial court's finding that it violated other regulations requiring specific notice.

[72] Pet. App. 20a.

[73] Pet. Brief at 32. This case does not present the issue of whether the issuance of an administrative complaint constitutes "final agency action" under the APA. Compare *Federal Trade Commission v. Standard Oil Co. of California*, 449 U.S. 232 (1980). Nor is there any statute which bars judicial review in the absence of an application. Compare *Mathews v. Eldridge*, 424 U.S. 319 (1976). This case involves agency refusal to act as required by regulations, specifically reviewable under 5 U.S.C. § 706.

[74] Contrary to Petitioner's assertion that this is not an action under the Administrative Procedure Act (Pet. Brief at 32) the

clearly defines "agency action" to include a failure to act on the part of the administrative agency.[75] The farmers in this case are clearly "adversely affected or aggrieved" by the FmHA's "failure to act" and are entitled to review and relief under 5 U.S.C. § 706 as the final agency action, here enforcement of the application deadline, is one "for which there is no other adquate remedy in a court." 5 U.S.C. § 704, see *Heckler v. Chaney*, —— U.S. ——, 105 S.Ct. 1649, 84 L.Ed.2d 714, 721 (1985) (Brennan, J., concurring), *Carpet, Linoleum and Resilient Tile Layers v. Brown*, 656 F.2d 564 (10th Cir. 1981), *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973) (*en banc*), *Davis v. Romney*, 490 F.2d 1360 (3rd Cir. 1974).

Any legitimate interest in applying the administratively set deadline could be accommodated, and the application period extended, without significant prejudice.[76] In *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532 (1970), this court established that with regard to procedural regulations which:

> were not intended primarily to confer important procedural benefits upon individuals . . . the general principal [is] that "[i]t is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given

district court compelled agency action (notice) under the Administrative Procedure Act and the court of appeals affirmed that mandatory injunctive relief specifically relying on the provisions of 5 U.S.C. § 706. (Pet. App. 13a).

[75] 5 U.S.C. § 551(13) defines "agency action" to include "the whole or a part of an agency . . . failure to act."

[76] As noted at p. 17, *supra*, both the statutes and regulations anticipated that loans would be received after the fact, for reimbursement of expenditures previously incurred. In addition, the legislative history of Pub. L. No. 93-237 indicated that Congress had previously invoked, and expected that the FmHA would invoke, a re-opening of the loan program (App. 19a, n.26) in light of Congress' "concern that administratively set deadlines would expire" when confusion over the availability of emergency loans precluded farmers from applying. Pet. App. 17a.



> case the ends of justice require. The action of either in such a case is not reviewable except upon a showing of substantial prejudice to the complaining party." *National Labor Relations Board v. Monsanto Chemical Co.*, 205 F.2d 763, 764."[77]

Confronted with two equally binding legislative provisions which it could not simultaneously enforce, i.e., the requirement that notice to the public be afforded and that applications following that notice be submitted within administratively established deadlines, the court below granted relief specifically authorized by the Administrative Procedure Act. It compelled "action unlawfully withheld" [notice] and "set aside agency action" [application of the deadline] found to be "without observance of procedures required by law." 5 U.S.C. § 706 (1977). Compare *Health Systems Agency of Oklahoma, Inc. v. Norman*, 589 F.2d 486 (10th Cir. 1978), *Jacksonville Port Authority v. Adams*, 556 F.2d 52 (D.C. Cir. 1977), *Gardner v. FCC*, 530 F.2d 1086 (D.C. Cir. 1976), *Miller v. United States*, 500 F.2d 1007 (2nd Cir. 1974).

In balancing these conflicting legislative concerns, the lower court was compelled to enforce the regulations requiring notice. "Where the benefits of individuals are affected, it is incumbent upon agencies to follow their own procedures. Before the [FmHA] may extinguish the entitlement of these otherwise eligible beneficiaries, it must comply, at a minimum, with its own . . . procedures." *Morton v. Ruiz*, 415 U.S. 199, 235 (1974). Where an agency seeks to deprive an individual of benefits, it "must be rigorously held to the standards by which it professes to be judged. See *Security & Exchange Commission v. Chenery Corporation*, 318 U.S. 80, 87, 88, 87 L.Ed. 626, 632, 633, 63 S.Ct. 454." *Vitarelli v. Seaton*, 359 U.S. 535, 546 (1959) (Frankfurter, J., concurring in part and dissenting in part). See also, *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

[77] *Id.* at 539. See also *Health Systems Agency of Oklahoma, Inc. v. Norman*, 589 F.2d 486 (10th Cir. 1978).

Here, the trial court and the court of appeals determined that the agency's inaction, in failing to provide the notice required by its own regulations, violated the clear intent and purpose of congress in mandating an extension of the loan benefit program, which was motivated by a concern "that administratively set deadlines . . . set by the [FmHA] . . . may expire thus precluding . . . farmers . . . from applying for benefits under [93-237]." [23]

To apply the administratively set deadline for applications, where other, equally binding regulations required the notice necessary to allow those applications, would frustrate, rather than encourage the statutory benefit scheme intended by Congress. A regulation which operates to create a rule out of harmony with the statute authorizing such regulations is a nullity. *United States v. Larionoff*, 431 U.S. 864 (1977), *Manhattan General Equipment Company v. Commissioner*, 297 U.S. 129, 134 (1936). See also *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-14 (1976); *Dixon v. United States*, 381 U.S. 68, 74 (1965).

Where, as here, agency's refusal to act is of such magnitude that it amounts to an abdication of statutory responsibility, a court has the power to order the agency to act to carry out its substantive statutory mandates. *Public Citizen Health Research Group v. Commissioner*, 740 F.2d 21, 32 (D.C. Cir. 1984), *Adams v. Richardson*, *supra*, *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 594-95 (D.C. Cir. 1971); cf. *Heckler v. Chaney*, —— U.S. ——, 105 S.Ct. 1649, 1658-62, 84 L.Ed.2d 714, 724 (1985).

The failure of objectively eligible farmers to apply for loan benefits in this case cannot be considered in a vacuum. Here, as in *Moser v. United States*, 341 U.S. 41 (1951), the farmers sought information and guidance

[23] Conf. Rep. 93-363, 93d Cong., 1st Sess. 2, *reprinted in* 1973 U.S.C. Cong. & Ad. News, 3342, 3343.



concerning the availability of loan benefits "from the highest authority to which [they] could turn," the FmHA local supervisors, and other agricultural lenders. Because of the FmHA's violation of its regulations, those sources continuously advised farmers that no loans were available. Since an executive agency must be rigorously held to the standards by which it professes its action to be judged, the courts below correctly held that before the FmHA may extinguish the availability of loan benefits, it must comply, at a minimum, with its own procedures requiring notice to those beneficiaries. *Morton v. Ruiz*, *supra*, *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954), *Service v. Dulles*, 354 U.S. 363 (1957), *Grueschow v. Harris*, 633 F.2d 1264 (8th Cir. 1980).

To require agency compliance with its regulations in this context does not estop the government from applying any *valid* requirement for administration of the loan program. It simply recognizes that the administrative enforcement of that deadline in the absence of notice would sanction, and preclude judicial review of, agency inaction in violation of law. *Grueschow v. Harris*, *supra*.

The decision below allows the enforcement of that deadline, provided only that the agency first observe the procedure required by law and is appropriate under the Administrative Procedure Act.

## II. UNDER THE ADMINISTRATIVE PROCEDURE ACT, A COURT MAY ESTOP THE GOVERNMENT FROM ENFORCING AN ADMINISTRATIVE DEADLINE, IN THE FACE OF VIOLATION OF OTHER REGULATIONS OF EQUAL DIGNITY, WHERE ESTOPPEL IS NECESSARY TO CARRY OUT CONGRESSIONAL INTENT AND WOULD NOT RESULT IN THE UNAUTHORIZED EXPENDITURE OF FUNDS.

In the context of an action under the Administrative Procedure Act seeking to compel agency action unlawfully withheld, the traditional objections to the applica-

tion of equitable estoppel against the government are not implicated. The Administrative Procedure Act was enacted with a congressional intent to provide for equitable relief where citizens suffer injury at the hands of federal agencies.[79] Here, if estoppel were applied to prevent the administrative termination of the right to apply for statutory benefits, such an action would be consistent with the intent of Congress, and would allow benefits to those whom Congress assumed would apply following notice. Here, it is the agency's refusal to provide notice, not the remedy provided by the court, that violates the will of Congress with regard to the receipt of statutory benefits.

Perhaps equally important, the relief below poses no substantial danger of fraud in the administration of loan benefits. No farmer is afforded the right to apply because of an isolated, oral misstatement or a generalized failure to provide notice not required by statute or regulations. This case, by contrast, presents a "gross failure on the part of an entire agency" to provide specific notice of benefits required by regulation to be provided to the public.

Although this Court has, to date, declined to apply the doctrine of equitable estoppel against the government, it has never considered the application of that doctrine in the context of agency wide violation of mandatory regulations, coupled with affirmative misrepresentations, on which citizens reasonably relied to their irrevocable detriment.

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[79] Only if citizens are provided with access to judicial remedies against government . . . agencies will we realize a government truly under law. The enactment of Section One of S800—the partial elimination of the sovereign immunity defense in actions seeking equitable relief—is an important step toward this goal.

H.R. Rep. No. 94-1656, Comm. on Judiciary, 94th Cong., 2d Sess., U.S.C. Cong. & Ad. News, 6121, 6129-30 (1976).



None of the cases relied upon by the Petitioner, declining to estop the government, deal with agency wide violations of regulations. Compare *INS v. Hibi*, 414 U.S. 5 (1973) (generalized failure to publish, not required by statute or regulation), *INS v. Miranda*, 459 U.S. 14 (1982) (delay in processing application determined not to be unreasonable and, apparently, not in violation of either statute or regulation), *Schweiker v. Hansen*, *supra* (alleged oral misinformation in violation of internal manual).[80]

Nor does this case present the problem of applying estoppel to expand the burden on the public fisc, or expend monies in a manner inconsistent with congressional dictates. Compare, *FCIC v. Merrill*, 332 U.S. 380 (1947) (expenditure of government funds for purposes specifically forbidden), *Heckler v. Community Health Services*, No. 83-56 (May 21, 1984) (estoppel will not preclude government from recovering monies paid in violation of binding regulations), *Sutton v. United States*, 256 U.S. 575 (1921) (estoppel does not permit expenditures of monies in excess of those appropriated by congress).[81]

Contrary to the Petitioner's assertion,[82] the traditional elements of estoppel are present here. *Heckler v. Com-*

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[80] This Court went to some pains to point out that the claims manual "is not a regulation. It has no legal force, and it does not bind the SSA." The "gross failure of an entire agency" in this case to follow regulations designed to impart notice of important benefits to the public certainly cannot be compared to "Connelly's minor breach of such a manual . . . ." In addition, affording retroactive benefits in *Schweiker* would have violated the statute limiting retroactive benefits to one year prior to application. *Id.* at 788.

[81] The trial court carefully limited the relief granted to afford only notice required by regulations, and the right of those objectively eligible to apply for loans which must otherwise comply with the applicable statutes and regulations.

[82] Pet. Brief at 27.

*munity Health Services, supra*, slip op. 9. The Petitioner's assertion that the record below fails "to demonstrate that the FmHA engaged in the sort of misleading conduct that could give rise to an estoppel of a private party"[83], is both factually and legally incorrect.

Here, unlike *Emergency Disaster Loan Association, Inc. v. Block*, 653 F.2d 1267 (9th Cir. 1981), the FmHA failed to provide the specific notice to County FmHA officials, USDA Defense Board Chairmen and other agricultural lenders required by its regulations. *Id.* at 1269.

Here, unlike *Emergency Disaster Loan Association, Inc. v. Block, supra*, the FmHA failed to make "such public announcements as appear[ed] appropriate" as a matter of law.[84] Here, FmHA officials affirmatively told farmers, "if you're a farmer, you don't qualify. This isn't for farmers."[85] Thus, the record here amply demonstrates a "definite misrepresentation of fact," in the FmHA's wide spread dissemination at the Live Oak meeting that no government benefits were available; in the continued statements by county FmHA supervisors to individual farmers that no such benefits were available; and in the FmHA's public notice during the initial loan period which contained the incorrect deadline for applications. The record also demonstrates widespread violation of regulations requiring the FmHA to provide the notice prior to the application deadline[86] during both the first and second application periods. Finally, the FmHA failed to provide any notice whatsoever until almost sixty days of the ninety day application period had expired,

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[83] Pet. Brief at 29.

[84] Pet. App. 43a. Compare *Emergency Disaster Loan Association, Inc. v. Block, supra*, where extensive announcements, including mailing of "fact sheets" resulted in 172 loans.

[85] Tr. Vol. 5, pp. 228, 267-68, Vol. 8, p. 615.

[86] Restatement (Second) of Agency § 8B, comment c (1958) (estoppel may arise from failure to act).



in the face of its own conclusion that such delay was "not in the public interest." Thus, although neither the trial court nor the court of appeals made a specific finding of affirmative misconduct, such a factual conclusion is fully supported in the record. Compare *Akbarian v. INS*, 669 F.2d 839, 842-44 (1st Cir. 1982), *Corniel-Rodriguez v. INS*, 532 F.2d 301 (2nd Cir. 1976). See also, *Martinez v. Orr*, 738 F.2d 1107, 1110-12 (10th Cir. 1984).

Certainly, the farmers who had been deprived of notice to which they were entitled under FmHA regulations, and had been affirmatively told by FmHA officials that there was no benefit for which to apply, reasonably and detrimentally relied on those acts of omission and commission in failing to apply for those benefits."[87]

Clearly the application of the administratively set deadline here would irrevocably deprive farmers of benefits intended by Congress, solely because of the FmHA's violation of its own regulations, unless the application period is extended. Unlike *Schweiker v. Hansen, supra*, the agency misconduct and failure to publicize in this case did cause the farmers to "fail to take action [apply] which they cannot now correct" in the absence of a judicial remedy. Compare *Morton v. Ruiz, supra; Moser v. United States, supra; Corniel-Rodriguez v. INS, supra.*

The objection that the application of estoppel against the government would override "the mandates of congress"[88] is, of course, not applicable where, as here, pre-

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[87] This is not a situation involving a sophisticated recipient of public funds who "should have been and was acquainted" with the benefits available. Compare *Heckler v. Community Health Services, supra*. Here, the agency's failure resulted in their own agent's belief that no benefits were available for which to apply. See pp. 6 and 9, *supra*. Compare *United States v. Locke*, —— U.S. ——, 105 S.Ct. 1785, 1801-02 (1985) (O'Conner, J., concurring).

[88] Pet. brief at 17.

venting the agency from enforcing its deadline will further, rather than defeat, the congressional policy behind the disaster loan benefit program. Compare *FDIC v. Harrison*, 735 F.2d 408, 413 (11th Cir. 1984) (estoppel imposed when agency did not claim that "the representations of its agents were unauthorized or contrary to statute or regulation."); *Molton Allen and Williams, Inc. v. Harris*, 613 F.2d 1176, 1178-79 (D.C. Cir. 1980) (authorized conduct can estop government), *Health Systems Agency of Oklahoma, Inc. v. Norman*, 589 F.2d 486 (10th Cir. 1978) (agency can be estopped from insisting upon self-imposed deadline not required by statute or legislative regulation), *Semaan v. Mumford*, 335 F.2d 704, 706 (D.C. Cir. 1964) (agency representation to employee can estop it from denying him procedural protections when not inconsistent with statute); cf. *Alameda v. Weinberger*, 520 F.2d 344, 351 (9th Cir. 1975) (agency approval of payment plan can estop it from applying internal guidelines not required by statute or legislative regulations).

Although unnecessary to a decision in this case, this court's prior decisions do not preclude the application of estoppel in the context of affirmative misconduct through breach of a mandatory duty to inform citizens of benefits available to them,[89] which results in a foreseeable change in circumstance.[90] In the unique situation where a court is faced with the failure of an entire agency to abide by binding regulations, coupled with widespread misrepresentation which forseeably results in the frustration of a congressionally created benefit program, the agency may be estopped from enforcing an administrative deadline under the Administrative Procedure Act.

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[89] Compare *Moser v. United States*, 341 U.S. 41 (1951), *Corniel-Rodriguez v. Immigration and Naturalization Service*, 532 F.2d 301 (2nd Cir. 1976).

[90] In this case a failure to apply [compare *Meister Bros. v. Macy*, 674 F.2d 1174 (7th Cir. 1982)].



## III. THE FmHA'S VIOLATION OF REGULATIONS REQUIRING NOTICE OF BENEFITS, FOLLOWED BY AN ADMINISTRATIVE TERMINATION OF THE RIGHT TO APPLY FOR THOSE BENEFITS, WOULD DEPRIVE ELIGIBLE BENEFICIARIES OF PROCEDURAL DUE PROCESS UNLESS THE AGENCY IS COMPELLED TO EXTEND, OR EQUITABLY ESTOPPED FROM ENFORCING, THE DEADLINE UNDER THE ADMINISTRATIVE PROCEDURE ACT.

To these farmers, who were objectively qualified under the regulations of the FmHA for loan benefits during both the initial and congressionally extended application periods, loans "are a matter of statutory entitlement for persons qualified to receive them." *Goss v. Lopez*, 419 U.S. 565, 573 (1975). See *Goldberg v. Kelly*, 397 U.S. 254, 262, n.8 (1970). *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). As such, this statutory entitlement is a "property interest" protected by the Fifth Amendment's Due Process Clause, and the FmHA was required to accord adequate notice to the class prior to administrative termination of those benefits.

"In assessing what process is due . . . substantial weight must be given to the good faith judgments of the [agency] charged by Congress with the administration of . . . programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals." *Mathews v. Eldridge*, *supra* at 349. Here, the FmHA has, by regulation, defined that procedure which is due with regard to notice. A violation of those regulations deprives eligible farmers of statutory benefits without due process.

This court has for many years utilized administrative regulations to define the process which is required prior to administrative termination of property interests. See, e.g., *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954), *Service v. Dulles*, 354 U.S. 363, 388 (1957), *Vitarelli v. Seaton*, 359 U.S. 535, 539-40

(1959), *Morton v. Ruiz*, 415 U.S. 199, 235 (1974). These cases have been correctly characterized as standing for the "fundamental concept" that violation of these regulations offend traditional concepts of fair play and due process. *NLRB v. Welcome-American Fertilizer Co.*, 443 F.2d 19, 20 (9th Cir. 1971); *Hammond v. Lanfest*, 398 F.2d 705 (2nd Cir. 1968); *Kona v. Laird*, 460 F.2d 1318 (7th Cir. 1972); *Antonuk v. United States* , 445 F.2d 592, 595 (6th Cir. 1971); *Hollingsworth v. Balcom*, 441 F.2d 419, 421 (6th Cir. 1971). "Underlying these decisions is a judgment, central to our concept of due process, that government officials no less than private citizens are bound by rules of law." *United States v. Caceres*, 440 U.S. 741, 758 (1979).

Where, as here, individuals reasonably rely on agency regulations promulgated to require specific types of notice, for the guidance and benefit of objectively eligible beneficiaries, and fail to apply in the absence of that notice, the Due Process rights of those citizens must be protected. Compare *United States v. Caceres, supra*, at 752-53.

Certainly the nature of the private interests affected by official inaction, the erroneous deprivation of the right to apply for those benefits because of that inaction, and the value of requiring agencies to comply with their own regulations all lead to the conclusion that fundamental concepts of due process compelled the relief below. *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

> [T]o say that there is no "right" to government [benefits] does not resolve the question of justiciability. Of course there is no such right; but that cannot mean that the government can act arbitrarily, either substantively or procedurally, against a person, or that such person is not entitled to challenge the processes . . . before he is officially declared ineligible for government [benefits]. An allegation of facts which reveal an absence of legal authority or basic fairness in the method of imposing debarment presents a justiciable controversy . . . .



*Gonzalez v. Freeman*, 334 F.2d 570, 574-75 (D.C. Cir. 1964).

"The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385 (1914); *Schroeder v. New York*, 371 U.S. 208 (1962). Especially in the context of binding regulations requiring specific notice reasonably calculated to inform citizens of their right to apply for benefits, notice in violation of those regulations "which is a mere gesture is not due process." *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 315 (1950).

> The rights of individuals in so important a matter as procuring emergency relief to help restore damage caused by a natural disaster should not be at the mercy or whims of an administrator. The [administrative] termination of the program without notice to the . . . farmers offends all traditional notions of fair play. The people have a right to expect better treatment from their government.

*Berends v. Butz*, 357 F.Supp. 143, 152 (D. Minn. 1973).

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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# REPLY

# BRIEF

No. 84-1948

# In the Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD E. LYNG, SECRETARY OF AGRICULTURE, ET AL., PETITIONERS

*v.*

RONALD E. PAYNE, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## REPLY BRIEF FOR THE PETITIONERS

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

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**REPLY BRIEF FOR THE PETITIONERS**

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The decision of the court of appeals requires the government to reopen an emergency loan program that was intended by Congress to provide short-term financial relief from crop and property losses suffered in 1973 and impermissibly estops the government from enforcing the legal deadline for filing emergency loan applications, which was April 2, 1974. Respondents defend this remarkable result by relying primarily on the Administrative Procedure Act and the associated doctrine that federal agencies must abide by their own regulations. Their arguments, however, virtually ignore the governing precedents and seriously distort the requirements of the APA.

1. Respondents' brief is premised almost entirely on two demonstrably erroneous contentions. First, respondents insist that the well-established doctrine precluding estoppel

of the government is not at issue in this case. See, *e.g.*, Resp. Br. i, 13-14, 15, 23. If that were true, there would have been no need for this Court to grant the government's initial petition for a writ of certiorari, vacate the court of appeals' decision, and remand for reconsideration in light of *Heckler* v. *Community Health Services,* No. 83-56 (May 21, 1984), or for the court of appeals (and respondents) to go to such lengths to attempt to distinguish cases such as *Schweiker* v. *Hansen,* 450 U.S. 785 (1981). In any event, as we explained in our opening brief (at 19-23), the court of appeals' decision undeniably forecloses the government from raising a valid legal defense to respondents' claims, *i.e.*, that their emergency loan applications would now be more than a decade out of time. This is an estoppel, notwithstanding the court of appeals' and respondents' persistent refusal to recognize it as such. The strictures against estopping the government would have little force indeed if they could be circumvented merely by an exercise in semantics such as that engaged in by respondents and the court below.[1]

Respondents' second premise is equally flawed. Respondents repeatedly contend that they remain "objectively eligible" for emergency loan benefits related to the 1973 flooding. See, *e.g.*, Resp. Br. 13, 15, 17, 22, 30. What respondents mean by this is unclear. Their failure to apply for loans before the deadline, of course, rendered them ineligible under the terms of the regulatory program. And as respondents concede (*id.* at 17 n.63), they have never been found to satisfy other applicable emergency loan eligibility requirements.

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[1]Respondents' absurd suggestion (Br. 23) that the court of appeals' decision does not estop the government because it "allows the enforcement of th[e] deadline, provided only that the agency first" complies with the publicity regulation, does not merit a response.



In fact, the loan program was quite plainly intended as an *emergency* measure to provide *interim* benefits until farmers could recover from the 1973 flooding. As the regulations made clear, loan funds could not be used "to produce new crops during 1974," and, a *fortiori,* could not be used to produce new crops during subsequent years. 7 C.F.R. 1832.86(a) (1975). Respondents' selective quotation (Br. 17 n.65) of Section 1832.81 of the regulations (Pet. App. 53a) omits the key phrase (here emphasized) that places the emergency loan program in its proper context: "The basic objective of [emergency] loans is to indemnify eligible farmers * * * in order that they may continue their future farming or livestock operations *with credit from other sources* * * *." See also 7 C.F.R. 1832.2 (1975) (objective of loan program is to allow farmers to "return to local sources of credit as soon as possible and in any event within a reasonable period"). Other features of the loan program—such as the filing deadline itself—also demonstrate that the loans were designed only to provide short-term relief from the disaster, not to grant windfalls ten or more years later. See, *e.g.*, 7 C.F.R. 1832.82(e) (1975) (requiring visual inspection of property damage). While, as respondents state (Br. 15 n.60), "[t]he emergency loan program continues," it has remained in place to provide relief from current disasters, not as a continuing source of substantial benefits to persons who could not reasonably have unmet needs today caused by disasters that occurred many years ago.

2. Respondents argue (Br. 15-23) that the relief awarded in this case is authorized by the provisions of the APA that direct courts to "compel agency action unlawfully withheld" and to "set aside agency action * * * found to be * * * without observance of procedure required by law." 5 U.S.C. 706(1) and (2)(D). Their argument suffers from several fundamental flaws: this suit was not properly brought under the APA; the regulation establishing the loan deadline is, contrary to respondents' contention, indisputably

valid; the APA, construed in light of this Court's precedents, does not authorize judicial invalidation of the deadline regulation as a remedy for violation of the publicity regulation; and, in any event, the Secretary would be acting well within his discretion in enforcing the filing deadline against respondents.

a. At the outset, we note that respondents have not offered any effective response to our argument (Gov't Br. 31-32) that, never having even applied for loans, respondents have not been subjected to any agency action reviewable under the APA. See 5 U.S.C. 551(13), 702, 704. This is not a facial challenge to regulations that govern ongoing conduct and might therefore warrant pre-enforcement review. Cf. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967). To the contrary, respondents challenge only the application of the filing deadline to their particular circumstances, and they have not demonstrated any cognizable hardship that would be entailed by postponing review until after the Secretary has had an opportunity to assess their individual claims.[2] The fact that respondents claim relief in part from an alleged unlawful failure to act does not, as they contend (Br. 19-20), excuse them from making any request for action from the agency. See generally, *e.g.*, *Heckler* v. *Chaney*, No. 83-1878 (Mar. 20, 1985), slip op. 1-3 (respondents sought review under APA after unsuccessfully requesting agency to take enforcement action); *Costle* v. *Pacific Legal Foundation*, 445 U.S. 198, 220 n.14 (1980) (5 U.S.C.

[2]Respondents boldly state (Br. 16 n.62) that their "failure to apply does not preclude judicial review under the [APA]." The only case they cite for this proposition, *Health Systems Agency of Oklahoma, Inc.* v. *Norman*, 589 F.2d 486 (10th Cir. 1978), however, does not support it. In that case, the plaintiff had in fact filed an application with the agency, and the agency rejected it as untimely. The plaintiff sought review under the APA of the agency's action in refusing to accept the application. See *id.* at 488-489.



706(1) would authorize judicial review of agency's refusal to act on a filed application). Respondents have never been the object of or affected by any agency action, and they have never requested the agency to take or refrain from taking any action. Surely the APA does not provide a license for courts to issue orders to agencies in such circumstances. See generally, *e.g.*, *National Ornament & Elec. Light Christmas Ass'n, Inc.* v. *CPSC*, 526 F.2d 1368, 1372-1373 (2d Cir. 1975).

b. Respondents occasionally suggest that the regulation establishing the filing deadline is not valid. See, *e.g.*, Resp. Br. 23 (emphasis in original) (court of appeals' decision "does not estop the government from applying any *valid* requirement for administration of the loan program"). But see *id.* at 21 (filing regulation is a "binding legislative provision[]"). As we explained in our opening brief (at 17-19), however, this regulation was promulgated in accordance with the requirements of the APA pursuant to the Secretary's statutory substantive rulemaking authority. Nothing in the regulation conditioned its validity on compliance with the agency's publicity undertakings. Nor, contrary to respondents' apparent contention (Br. 22), did Pub. L. No. 93-237 impose such a condition.[3] Indeed, the statute made no reference to publicity whatever. See *Emergency Disaster Loan Ass'n, Inc.* v. *Block*, 653 F.2d 1267, 1271 (9th Cir. 1981). There is simply no disputing the fact that the April 2, 1974 deadline is a valid, legally effective requirement for the disbursement of emergency loan funds in connection with the 1973 flooding.

[3]Respondents' reliance (Br. 22 & n.78) on the legislative history of Pub. L. No. 93-237 is unavailing. The report on which they rely, S. Rep. 93-363, 93d Cong., 1st Sess. 2 (1973), establishes only that Congress "expect[ed] that * * * the Farmers Home Administration [would] extend for 90 days * * * the deadline for seeking relief from previously declared disasters." That, of course, is precisely what the agency did and what respondents now would invalidate.

c. Respondents contend (Br. 21-23) that the APA establishes an ill-defined balancing test under which the court of appeals could bar enforcement of the deadline regulation as a remedy for the agency's failure to comply with the publicity regulation. Their argument flies in the face of the plain language of the APA and this Court's estoppel precedents, and it is not supported by the cases on which respondents rely.

Respondents urge that the court of appeals' decision is supported by 5 U.S.C. 706(1), which authorizes courts to "compel agency action unlawfully withheld." They fail to respond to our opening brief, however, where we pointed out (at 32-33) that the only agency action the court of appeals determined to have been improperly withheld here was the dissemination of a sufficiently informative press release—and respondents certainly did not bring this action to require the agency merely to comply with its publicity regulation. Respondents' reliance on 5 U.S.C. 706(2)(D), which authorizes courts to set aside agency action taken "without observance of procedure required by law," is equally misplaced. The deadline regulation, as we have just explained, was promulgated in full accordance with the procedures prescribed by the APA; compliance with the publicity regulation was not a procedural prerequisite to its binding force as a legislative rule.[4] Section 706(2)(D) therefore has no application. See, *e.g., St. James Hospital* v. *Heckler,* 760 F.2d 1460, 1465 (7th Cir. 1985) (inquiry under Section 706(2)(D) is "whether the [r]ule complies with the procedural requirements of the APA"), cert. denied, No. 85-256 (Oct. 15, 1985); *New England Coalition on Nuclear Pollution* v. *NRC,* 727 F.2d 1127, 1131 (D.C. Cir. 1984).

[4]Indeed, the court of appeals (Pet. App. 18a) and even respondents, in referring to the deadline as a "binding legislative provision[]" (Br. 21), implicitly concede this point.



Respondents' argument is completely at odds with this Court's cases holding that the government may not be estopped from enforcing valid regulatory restrictions on the receipt of monetary benefits. Respondents apparently dismiss both *FCIC* v. *Merrill,* 332 U.S. 380 (1947), and *Schweiker* v. *Hansen, supra,* as involving statutory, rather than regulatory, limitations. See Resp. Br. 16 n.60, 17 n.64, 25 & n.80. As we explained in our opening brief (at 34), however, the Court held in each of these cases that the government could not be estopped from enforcing valid regulations such as the one at issue here. See also *Utah Power & Light Co.* v. *United States,* 243 U.S. 389 (1917) (refusing to estop government from enforcing regulatory and statutory provisions regarding use of public lands). In *Merrill,* it was not a statute, but the "Wheat Crop Insurance Regulations [that] barred recovery." 332 U.S. at 382. The Court's reasoning is especially instructive: it noted that if the governing statute had prohibited the insurance at issue, the plaintiff would plainly be barred from recovery (*id.* at 384), and the Court concluded that the same rule should govern with respect to regulatory restrictions. In short, legislative regulations issued under authority delegated by Congress "limit the liability of the Government *as if they had been enacted by Congress directly.*" *Id.* at 385 (emphasis added). See also, *e.g., Phelps* v. *FEMA,* No. 85-1591 (1st Cir. Feb. 28, 1986) (refusing to estop government from enforcing flood insurance regulation); *City of Oceanside* v. *FEMA,* No. 83-5747 (9th Cir. June 19, 1984), cert. denied, No. 84-814 (Feb. 19, 1985) (same).

Similarly, in *Schweiker* v. *Hansen, supra,* the question was whether the government could be estopped from enforcing a regulation requiring that applications for Social Security benefits be in writing. See 450 U.S. at 786, 790. The issue was not, as respondents contend (*e.g.,* Br. 16 n.60), whether the government could be estopped from enforcing

a statutory limitation on benefits to 12 months' prior to the filing of an application, but whether the regulatory definition of what constitutes the filing of an application for this purpose would be enforced. Again, the Court refused to estop the government from enforcing its regulation, relying on *Merrill.* See 450 U.S. at 788.

The Court has also made clear in suits seeking tax refunds that the government "may insist upon full compliance with [its] regulations" (*Angelus Milling Co.* v. *Commissioner,* 325 U.S. 293, 296 (1945)) and that the granting of an extension of time is "a legislative, or administrative, not a judicial, function" (*Scaife Co.* v. *Commissioner,* 314 U.S. 459, 462 (1941) (footnote omitted)). In *Scaife Co.,* the taxpayer had made a ministerial error on its first tax return and had filed an amended return within the time allowed for filing where an extension of time has been granted. The Commissioner declined to accept the amended return, however, because the taxpayer had not filed a written request for an extension of time as required by regulation. The Court refused to bar enforcement of the regulation on equitable grounds, reasoning that "no extension of the due date may be had except pursuant to the procedure which has clear statutory sanction," *i.e.,* through the written request required by the regulations. *Ibid.* Similarly, in *Angelus Milling Co.,* the taxpayer had failed to file its administrative claim on the correct form. The Court held that it could not judicially impose a waiver even though the Commissioner could voluntarily waive "technical objections" for "considerations of fairness." 325 U.S. at 297. It would be inconsistent with the reasoning of these cases to hold that the government may be equitably estopped from enforcing the regulatory filing deadline at issue here.

Respondents' reliance (*e.g.,* Br. 20-21) on *American Farm Lines* v. *Black Ball Freight Service,* 397 U.S. 532 (1970), and similar cases from the courts of appeals is



unavailing.[5] These cases hold only that administrative agencies retain the discretion to waive rules " 'adopted for the orderly transaction of business' " (*American Farm Lines,* 397 U.S. at 539 (citation omitted)) without running afoul of the requirement that agencies adhere to those rules that "confer important procedural benefits upon individuals" (*id.* at 538). This line of cases is simply irrelevant to the type of regulation at issue here, which is addressed not to the agency's "internal * * * housekeeping" (*United States* v. *Caceres,* 440 U.S. 741, 760 (1979) (Marshall, J., dissenting)) but to the applicant's eligibility for government benefits. The deadline in this case was not imposed for reasons of mere administrative convenience but as an integral part of the emergency loan program, which was intended by Congress only to provide short-term relief.[6] We are not aware of any case in which a court has relied on *American Farm Lines* as authority for estopping the government from enforcing such a valid regulatory condition on the receipt of public benefits.

d. Even if respondents were correct in arguing that the APA authorizes courts to compel waivers of valid regulatory eligibility requirements in appropriate circumstances, the Secretary quite plainly would not abuse his discretion by applying the filing deadline in this case. This is made clear by a comparison with the very case on which

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[5]Respondents also rely (Br. 21, 23) on the *Accardi* line of cases, but they fail to respond to the discussion of those cases in our opening brief (at 36-38). Nor do they explain how ordering FmHA to ignore its regulation establishing the filing deadline for emergency loans can be characterized as requiring the agency to follow its own regulations.

[6]The regulations now governing the emergency loan program continue to specify loan application deadlines. See 7 C.F.R. 1945.161(a)(1) and (3). Consistent with the intent of the program to provide only interim relief, the regulations also specify that applications must be processed within 12 months. *Ibid.*

respondents rely most heavily, *Health Systems Agency of Oklahoma, Inc.* v. *Norman,* 589 F.2d 486 (10th Cir. 1978). There, the court recognized that "a refusal to waive non-jurisdictional deadlines would generally not constitute an abuse of discretion." *Id.* at 491. In that case, the plaintiff's application to be designated as a "Health Systems Agency" by the Department of Health, Education, and Welfare was filed 55 minutes after expiration of the administrative deadline. *Id.* at 488-489. Such a brief delay cannot be likened to the situation here, where respondents did not even file this suit until more than two years after the deadline had passed and have, even now, failed to file loan applications with the agency.

Moreover, the court in *Norman* held that the refusal to waive the deadline in the circumstances presented was an abuse of discretion because the agency's refusal was "flatly contrary to articulated agency policy" governing such waivers and waiving the deadline served "the legitimate governmental interest[] in facilitating comparative analysis among applicants." 589 F.2d at 492. Here, by contrast, enforcement of the filing deadline would not violate any other administrative or statutory policy. Rather, enforcement of the filing deadline in this case serves the important purposes of assisting the agency in evaluating an applicant's eligibility and preventing use of emergency loan funds for improper expenditures. See Gov't Br. 21-22, 35. Cf. *United States* v. *Boyle,* No. 83-1266 (Jan. 9, 1985), slip op. 8 ("fixed dates * * * are often essential to accomplish necessary results"); *United States* v. *Kubrick,* 444 U.S. 111, 117 (1979) (citation omitted) ("[T]he plea of limitations [is] a 'meritorious defense, in itself serving a public interest.' ").



3. Finally, respondents argue (Br. 23-28) that estoppel is appropriate in this case.[7] Their argument rests in large part on the erroneous premise that invalidation of the filing deadline would be consistent with Congress's intent in establishing the emergency loan program. As we have demonstrated, however, enforcement of the deadline is what would best further Congress's purposes, and failure to comply with the notice requirement does not change that conclusion because Congress did not intend notice to be a precondition to the validity of the deadline. See Gov't Br. 35-36; page 5 & note 3, *supra.*

In arguing that FmHA engaged in misleading conduct, respondents apparently do not rely on the sole finding of misconduct made by the court of appeals, that the agency failed to comply with its regulation requiring that the media be informed "of the provisions of P.L. 93-237." Pet. App. 54a.[8] For the reasons stated in our opening brief (at 29-31),

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[7]Respondents' due process argument (Br. 29-31), which was not addressed by either court below, does not merit extended discussion. As we have explained here and in our opening brief, compliance with the publicity regulation was not a procedural prerequisite to application of the filing deadline. Thus, even if respondents may claim a protected property interest in emergency loan funds, which we dispute (see generally *Walters* v. *National Ass'n of Radiation Survivors,* No. 84-571 (June 28, 1985), slip op. 14 n.8), they received ample process by FmHA's publication of the filing deadline in the Federal Register. See *Emergency Disaster Loan Ass'n, Inc.,* 653 F.2d at 1271. Moreover, as we have also explained, the agency complied with its own procedures by distributing to the news media the suggested press release that accompanied the original staff instruction establishing the publicity requirement. Finally, the mere violation by an agency of its own regulation does not rise to the level of a due process violation where, as here, the regulation itself is not constitutionally required. See *United States* v. *Caceres,* 440 U.S. 741 (1979).

[8]Indeed, respondents admit (Br. 9-10) that the sample press release accompanying the publicity directive was distributed (see Gov't Br. 30), although they complain that more was not done. The agency did not, however, obligate itself to do more.

which respondents have failed to dispute, the court of appeals' conclusion that FmHA violated this regulation is insupportable. Since the purported violation of this regulation is the entire basis for respondents' APA argument, it is surprising that they offer no defense of the court of appeals' conclusion. Nor do respondents explain how they could reasonably have relied on the publicity regulation when the filing deadline was published in the Federal Register (and, indeed, in the very same place as the publicity regulation).

Respondents now rely (Br. 26-27 & n.87) on findings made by the district court (Pet. App. 37a-42a) concerning alleged isolated oral misstatements by agency officials. The court of appeals did not rely on these findings (see *id.* at 24a). Such alleged misstatements present, of course, precisely the "substantial danger of fraud" (Resp. Br. 24) that respondents inconsistently claim is not present in this case. See, *e.g., Heckler* v. *Community Health Services,* No. 83-56 (May 21, 1984), slip op. 13. Moreover, much of this purported misconduct relates to publicity given to the terms of the loan program before they were liberalized in January 1974 by Pub. L. No. 93-237. For example, the "Live Oak meeting" to which respondents refer (Br. 26) took place in June 1973. Pet. App. 37a. Any misstatements made at that time are simply irrelevant to whether FmHA adequately and accurately represented the terms of the superseding loan program, the benefits of which respondents are now seeking. Similarly irrelevant to whether respondents received legally adequate notice is whether various agency officials and private lenders were given notice. Compare Resp. Br. 26 with Pet. App. 24a. Finally, even respondents refrain from claiming that all class members (or even a substantial portion of them) actually received—and therefore might actually have relied on—misinformation from



the agency. Accordingly, the classwide relief mandated by the court of appeals is wholly insupportable.[9]

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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*Solicitor General*

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[9]Even if estoppel of the government ever were appropriate, it is most difficult to see how it could be ordered on a classwide basis in view of the necessarily individualized proof of reliance that would have to be made by each class member.